SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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No. 669

JOSEPH COHEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice and the Associated Justices of the Supreme Court of the United States:

The petitioner, Joseph Cohen, prays that a writ of *certiorari* issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, dated October 18, 1944, to the extent that it affirms the judgment of the United States District Court for the Southern District of New York, convicting petitioner of violating the mail fraud and conspiracy statutes (Title 18 U. S. C. Sec. 338: Title 18 U. S. C. Sec. 88).

I

Opinion of the Court Below

The opinion of the Circuit Court of Appeals, Second Circuit, rendered by Learned Hand, J., is not yet officially reported; but a printed copy is annexed to the record, certified to the Supreme Court. There was no opinion in the District Court. A copy of the opinion of the Court of Appeals is annexed as Appendix A.

Date of Judgment Below and of Denial of Rehearing

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on October 18, 1944. Petition for rehearing was denied on October 10th, 1944. Issuance of mandate was stayed by order of the court below, pending application to this Court for a Writ of *Certiorari.*

II

Judisdiction

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Title 28, Sec. 347 a), and Rule XI of the Rules of Practice and Procedure in Criminal Cases, promulgated by this Court on May 7, 1934. (18 U. S. C. A. following Sec. 688), 292 U. S. 661, 666.

III

Statutes Involved

The following statutes are involved:

1. Criminal Code Sec. 215, which sets forth as a crime the use of the U. S. mails in a scheme to defraud. *U. S. Code Title 18, Sec. 338.*

2. Criminal Code Sec. 37 which sets forth the crime of conspiracy to commit an offense against the United States, *U. S. Code Title 18, Sec. 88.*

IV

Summary Statement of Matter Involved

Mass Prosecution

This was a case of mass prosecution. The appellant, Joseph Cohen, as one of seventy-five defendants, charged in a thirty count indictment with violating the mail fraud and conspiracy statutes, was convicted after *seven months' trial,* before Porterie, J. He was sentenced to two consecutive terms, five years on one substantive count and two years on the conspiracy count, totaling seven years of imprisonment, and a $5,000 fine.

The Indictment

The indictment[1] found September 30th, 1938, in the nature of a "catchall", charged (in 29 counts, differing only in the count letters) a *single* scheme alleged to have involved the perpetrating and indulging in forty-three types of activity, one of which was the making of forty-one different types of listed misrepresentations; and a conspiracy count (#30) listing twenty-nine overt acts, five of them (1, 2, 3, 4 and 29) dated more than three years before the indictment.

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[1] The indictment, 62 pages in length, is confused and sweeping, practically defying analysis. In brief compass, there is charged the fraudulent sale of (a) stock in five separately named, unaffiliated corporations; (b) land, and interests in oil and gas lands, all differently described, in five different states, and elsewhere; (c) participation trust certificates of an independent corporation; and as part of the conspiracy that (a) six corporations were to be formed; (b) eleven royalty trusts were to be organized; (c) forty-one sets of false representations were to be uttered; and (d) that the defendants (without specifying which) would maintain twenty-three different corporate or trade names in thirty-six locations in Boston and New York.

The Trial

There were over 16,000 pages of testimony; more than 4,000 documentary exhibits.

The trial commenced August 4th, 1941. It was concluded March 8th, 1942.

Though *one* large conspiracy of all seventy-five defendants was charged, involving all the corporations and securities listed, there was evidence instead, as to some *five hundred episodes*, in numerous separate, unconnected schemes, aggregating over *two hundred conspiracies*, and so defined in the opinion below:

> "The prosecution put in evidence of more than 200 separate fraudulent transactions with customers; each of these was a 'scheme' each was a 'conspiracy', • • •" (op. Hand, J. p. 2248)

The combinations of defendants (none more than five—the majority less than three), involved in the separate frauds, were as varied as there were alleged victims (about 100 named in the indictment and about 200 named at the trial). Yet, all of this evidence was admitted as part of the offense charged (*there being no proof of any single scheme involving all defendants*), and in each case, despite persistent vigorous objection, all the evidence was held as binding upon all the defendants (R. 176-7, 248, 73, 4773, 12623), not on the theory of "similar offenses" (R. 560, *et seq.*) but to furnish "background" and "association".

Evidence, offered at the trial, included all conspiracies involving defendants (1) as to whom the government severed, (2) who had pleaded guilty and were not on trial, (3) who were on trial and coupled with persons *not named in the indictment;* (4) who were on trial with some who were not, and (5) in one case, even as to a defendant who

had successfully invoked the statute of limitations and procured dismissal of the indictment before trial.[2]

Proof of all these conspiracies, uniformly admitted over objection, *was held binding on all defendants.*

While it is physically impossible within the permissible limits of this petition to furnish the material facts, even in skeleton form, enough may be suggested for this Court to realize, from this gargantuan record, that the confusion and multiplicity of issues were bound to produce irreparable prejudice to the host of defendants, tried *en masse* for a mail fraud conspiracy—and that in the maze of it all, an individual defendant was quite helpless to protect himself from the sinister inroads of the accusatory testimony leveled at others, and yet ruled binding as to him.[3] The Court refused to limit the testimony in any respect (R. 712), deeming the conspiracy count as a barrier to any differentiation with regard to the defendants as a group. The Court declared that whether the case would continue for "eight weeks or a lifetime" (R. 738,9)—the accumulation of evidence, binding on all defendants, would continue to be received. Such a grotesque proceeding inevitably produced the result of forcing defendants to plead guilty because of the danger, the expense and the utter futility of defense in such a protracted trial. No wonder that in the hope for leniency, half of the defendants who had the

[2] See *U. S. v. Ames*, 39 Fed. Supp. 885 in which the defendant, Benjamin Finn's plea in abatement was sustained on the basis of the Statute of Limitations. Notwithstanding this, the transactions in which he was allegedly involved with one Klimm (R. 3666-3729) were nevertheless presented at the trial by the prosecutor, and by the ruling of the court made binding upon all the defendants, including appellant, Cohen. These constituted four schemes to defraud, all in Massachusetts, beyond the jurisdiction of the District Court.

[3] The Court, by agreement with counsel, ruled that all objections and exceptions taken, should inure to the benefit of each defendant—this to apply throughout the trial.

temerity to proceed to trial had pleaded guilty or *nolo contendere* long before the trial was over.

Despite this mountain of proof, further evidence was allowed as to (1) transactions antedating 1932, the date alleged as the genesis of the conspiracy, and (2) allegedly fraudulent transactions involving securities and alleged victims not even mentioned in the indictment; and though the defendants had been denied a bill of particulars, timely sought, this additional mass of confused and chaotic matter was held binding on all defendants.

Prior pleas of guilty, and some severances moved by the Government, left twenty-seven defendants at the opening of the trial, of whom, as before stated, thirteen defendants in the course of the trial pleaded either guilty or *nolo contendere*.

Some Basic Errors at the Trial

The Court declined a severance and a denial of motions for mistrial on frequent occasions of grave prejudice. Incompetent and hearsay evidence was received binding on all defendants and relating to a mass of confused and chaotic data as to five hundred transactions in respect to all of which but a handful, the appellant Cohen, was not involved or even mentioned. The Court made erroneous rulings on jurisdictional matters and in the defining of the crimes charged.

The Court made an inadequate charge, shot through with error, and declined all requests to charge.

The jury was instructed to determine whether there was evidence to support any *one* of the forty-one representations with regard to the substantive counts, or any *one* of the twenty-nine overt acts as to the conspiracy count. The Court refused to withdraw from the jury's consideration a

single representation or overt act despite the fact that many of them were concededly not proved, and some were barred by the Statute of Limitations; but ruled, and so charged, that proof of a *single* representation or of a *single* overt act was sufficient in law to support a verdict of guilt as to any *one* of the defendants.

Thus the jury was permitted to base a verdict of guilty on an unproved or immaterial representation or upon an unproved or outlawed overt act.

Of the thirteen defendants, at the finish, eleven were convicted, two acquitted. At the close of the case on the government's motion, the following counts were dismissed: nos. 10, 11, 12, 16, 17 and 29.

None of the defendants were convicted on counts 3, 8, 13, 14, 15, 21, 24, 26 and 28.

The Conviction and Sentence

The appellant Cohen was convicted on counts 1, 4, 22, 23, 27, 30—the only counts in connection with which his name was mentioned. He was sentenced to a term of imprisonment for five years on Count 1, two years and a $5,000 fine on Count 30 (conspiracy), the prison terms to run consecutively. Imposition of sentence on Counts 4, 22, 23 and 27 were suspended with a three year probationary period at the end of the prison term.[4]

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[4] It is significant to note that despite L. Hand, J.'s observation in the opinion below that the "verdict gives internal evidence of careful discrimination" (op., p. 2251), the fact is that the verdict shows quite the contrary. It is demonstrable that the verdict of the jury was based not on any theory of conspiracy; but defendants were convicted in connection with counts as to which their names were mentioned. As to fifteen counts, there was no conviction (six having been withdrawn by the government, and the jury having acquitted on nine). As to only six counts was more than one defendant convicted, and in groupings of two and three—and on eight counts, one defendant each.

V

The Questions Presented[5]

1. Whether this *seven months' mass trial* was, as to the appellant, Joseph Cohen, fair and impartial, as guaranteed by the Constitution.

2. Whether the variance between indictment and proof was substantial and material, and worked practical prejudice to the appellant.

3. Whether there was a misjoinder of defendants.

4. Whether there was a misjoinder of offenses.

5. Whether there was reversible error:

(a) in the admission of evidence as to some two hundred unconnected and unrelated conspiracies, when only a *single* conspiracy was alleged in the indictment; and

(b) in the admission of evidence as to some five hundred transactions, in the main, wholly unconnected with appellant, Cohen, yet held to be binding upon him, as well as upon all the defendants, for the purpose of showing "association" and "background".

6. Whether there was reversible error in assuming that there was authority for this type of joint trial by applica-

[5] A large variety of important questions of law are necessarily presented by this excessively long and intricate record. In listing some of these for the court's examination, stress is laid upon the imposing difficulties with which a defendant is confronted, in formulating a schedule of errors, for appellate perusal, in a case of mass prosecution such as this. In selecting, from the vast reaches of the record, the multitudinous grounds of prejudicial error that are inescapably bound to develop, there is a wilderness of data to be ploughed over and reduced to extracts—a prodigious task, taxing the ingenuity of counsel, in their earnest effort to be of aid in presenting all essential items within the confines of a readable brief. While the problems are many and varied, none is deemed unimportant, and all, it is believed, constitute substantial and reversible error.

tion of the doctrine of immaterial variance, stated in *Berger* v. *U. S.*, 295 U. S. 78.

7. Whether there was reversible error in denying a severance, to appellant Cohen, forcing him to be tried on a number of schemes, and not upon the *single* scheme alleged in the indictment, and denying such applications at the beginning, during, and at the end of the trial.

8. Whether there was reversible error:

(a) in the charge of the trial judge for inadequacy and error;

(b) in the rejection by the trial court of all requests to charge; and

(c) in the statements by the Court to the jury during the trial and in the Court's charge, and never specifically clarified or corrected, to the effect that the defendants were to be adjudged guilty if they were found to have entered into or become parties to a scheme to defraud—which instructions were not coupled with (1) the gist of the offense, namely, proof of the use of the mails in pursuance thereof, —or (2) the doing of an overt act.

9. Whether there was reversible error by the trial court in holding that there was evidence of the mailing of the Count I letter when the only proof in support of such finding was merely the uncertain self-contradictory *opinion* of a witness.

10. Whether there was reversible error in admitting in evidence, as binding upon all of the defendants, including the appellant, Cohen, the opinion of the Circuit Court of Appeals (10th Cir.) in the unrelated mail fraud case of *Rosenberg* v. *U. S.*, 120 F. (2) 1935, and the reading of that entire opinion *verbatim* to the jury.

11. Whether there was reversible error:

(a) in the refusal of the trial court to withdraw from the jury's consideration, *any one* of the forty-one representations alleged in the substantive counts, although concededly some were not proved; and

(b) in instructing the jury that a verdict of guilt on the substantive counts could be based on *any one* of the forty-one representations alleged in the indictment, despite the immateriality of some, and the lack of proof of others.

12. Whether there was reversible error:

(a) in the trial court's refusal to withdraw from the jury's consideration *any one* of the twenty-nine overt acts alleged in the conspiracy count, although concededly some were not proved, and five of them were barred by the Statute of Limitations; and

(b) in instructing the jury that a verdict of guilt on the conspiracy count could be based on *any one* overt act, *not excluding* those not proven, nor the five overt acts laid before September 30th, 1935, three years before the indictment, and which overt acts, Nos. 1, 2, 3, 4 and 29 were all therefore barred by the Statute of Limitations.

13. Whether the trial court committed reversible error in sustaining, and even commending, the mode of interrogation adopted by the prosecutor in cross examination of appellant, Cohen, by which he imputed, by the affirmations in his questions, criminal convictions to the employees of the appellant.

14. Whether there was reversible error in sustaining the conviction of appellant Cohen as to Count I, based solely upon the uncorroborated testimony of the malicious and wholly disreputable accomplice Mussman who was

"admittedly concerned with making a case against the accused"[6] and whether or not, in view of the other surrounding prejudicial error, such conviction should have been set aside for reasons similar to that which produced the reversal in *Berger* v. *U. S.*, 295 U. S. 78.

15. Whether there was reversible error in the refusal of the trial court to declare a mistrial because of the malicious deportment of the witness Mussman, and the atmosphere of passion and prejudice he studiously developed against the defendants, including the appellant and his counsel; and the attitude of the trial court in relation to Mussman's entire course of conduct.

16. Whether there was reversible error in the failure to direct a verdict for the appellant Joseph Cohen on Count I, since his purported participation in the scheme involved therein (the Anderson transaction) had definitely terminated in May, 1935; and the "count" letter, purportedly mailed subsequent to its termination, to wit, on October 4, 1935, was (as admitted by the prosecutor in his summation)

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[6] The witness Mussman was thus described by L. Hand, J. in the opinion in the court below, the court stating that he was

> "* * * a confessed unblushing rogue, *admittedly concerned with making a case against the accused*, partly in the hope of lenity for himself, partly apparently from malice." (op. p. 2257)
>
> *"He was, on his own admission, an altogether abandoned character, frank to confess a long career of cheating and fraud; seeking to secure lenity by his testimony and hostile to the accused."* (p. 2247) (Emphasis supplied)

This turbulent vindictive witness who testified for about six weeks, with practically no rebuke or restraint (despite his venom and violent outbursts), and not without the aid of some solicitude from the court, did, as the record will show, with deliberation, pollute the atmosphere of the trial. His tirades, malicious epithets and attacks upon the appellant and appellant's trial counsel, constituted a studied and calculated effort not only to poison the jury against appellant, but also to destroy the effectiveness of his lawyer.

at a time when what occurred constituted "independent transactions."

17. Whether the Court of Appeals erred in ruling that Section 557 of Title 18, U. S. Code permits the joinder of crimes, when the accused are different.

18. Whether the trial court erred:

(a) in deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein, was for the jury to determine;

(b) in receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme;

(c) in permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy;

(d) in restricting and destroying the value of cross examination of government witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and

(e) in admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.

19. Whether the Court of Appeals erred in holding that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment.

20. Whether the Court of Appeals erred in holding that appellate review need be no more exacting in criminal than

in civil cases and that evidence "sufficient to support a civil verdict will support a criminal one".

21. Whether the Court of Appeals erred in ruling that in a conspiracy case a defendant must, if need be, run the risk of an unfair trial.

22. Whether the Circuit Court of Appeals erred in upholding the verdict, considering the unusual character of this case, despite the *cumulative* sentences on the substantive and conspiracy counts, although in essence this imposed double punishment upon appellant for the same crime. (*Amendola* v. *U. S.*, 17 F. (2) 529)

23. Whether it was reversible error for the trial court to permit to the prosecutor a private *ex parte* argument on defendant's motion to inspect papers in the government's possession, and to exclude the defendants and their counsel from such argument—in violation of the fundamental constitutional rights of the accused to be present in person, or by counsel, throughout every phase of the trial.

24. Whether the Court of Appeals erred in ruling that all other errors, urged by appellant, not specifically discussed in the opinion, were not reversible.

25. Whether the Circuit Court of Appeals erred in failing to appraise the errors and the prejudicial conduct in the course of the trial in the aggregate as reversible, even though individually, and in the absence of concomitant errors, they might not have been sufficiently prejudicial to have justified a mistrial, or to require a new trial.

VI

Reasons for Allowance of Writ

In the opinion below (L. Hand J.), it is pointed out that there were propositions of federal law on fundamental questions, pertinent to its decision, as to which there is

diversity in the circuits. These are urged as the basis for *certiorari* (Rule 38, 5b).

The following additional special and important reasons are submitted: (a) Important questions of federal law, as will hereinafter appear, have been decided in a way probably in conflict with applicable decisions of the Supreme Court, and; (b) The Court below has so far sanctioned a departure by the United States District Court for the Southern District of New York, from the accepted and usual course of judicial proceedings, specified *infra*, as to call for an exercise of the power of supervision by the Supreme Court:

I. The Court of Appeals has erred in its failure to appraise the inequity of this most extraordinary criminal trial—which is *sui generis* for its length and complexity—and the injustice wrought by this mass prosecution in depriving the defendants of a fair, speedy and impartial hearing as guaranteed by the Federal Constitution, since in such giant prosecution, it is inevitable for the accused to be buried under an avalanche of grave prejudicial error.

II. The Court of Appeals held that Sec. 557 of Title 18, U. S. Code, permits the joinder of crimes when the accused are different; referring in its opinion to the following diversity in the circuits (op. p. 2252) citing, in support of its position:

Second Circuit:

U. S. v. *20th Century Bus Operators*, 101 F. (2) 700.

Seventh Circuit:

U. S. v. *Tuffanelli* 131 F. (2) 890, 893, 894 opinion by a divided court (Major, J. dissenting on authority of *McElroy* v. *U. S.*, 164 U. S. 76.)

and the following case, *contra:*

Eighth Circuit:

Coco v. *U. S.*, 289 F. 33.

III. The Court of Appeals held that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment; referring in its opinion to the following cases, (op. p. 2263) as contrary to its position:

Eighth Circuit:

Ware v. *U. S.* 154 F. 577;
Culp v. *U. S.* 131 F. (2) 93, 100;
Lonabaugh v. *U. S.* 179 F. 476;
McWhorter v. *U. S.* 299 F. 780.

Ninth Circuit:

Jones v. *U. S.* 162 F. 417, 425;
Hedderly v. *U. S.* 193 F. 561, 569.

Court of Appeals of the District:

Lorenz v. *U. S.* 24 App. D. C. 337, 87.

U. S. Supreme Court:

Brown v. *Elliott* 225 U. S. 392.

The Second Circuit holds squarely against this body of authority, and asserts, in doing so, (despite *Brown* v. *Elliott*, 225 U. S. 392, 401 where *Lonabaugh* v. *U. S.* 179 F. 476 is quoted with approval) that its decision is based upon its concept of *Kissel* v. *U. S.*, 218 U. S. 601 (which it recognizes to be not a conspiracy case), as one not interpretable "in any other sense than as contrary to such a notion." (Op. p. 2263).

IV. The Court of Appeals erred in holding

(a) that evidence "sufficient to support a civil verdict will support a criminal one" (op. p. 2245);

(b) that it is wrong to "assume that an appellate court, before affirming a verdict in a criminal case, will demand that the evidence shall be more cogent and persuasive than when reviewing a civil verdict" (op. p. 2245) and

(c) that it does not accept the proposition of law that "an appellate court will more straitly scrutinize the evidence necessary to sustain the verdict" (op. p. 2245).

The Court of Appeals, admitting that "*there is indeed authority for that position but it is not the law as we understand it*", relies on two prior decisions of the Second Circuit (both rendered by L. Hand, J.) to sustain its position with regard to appellate review, *Feinberg* v. *U. S.*, (2nd Cir.), 140 F. (2) 592; *U. S.* v. *Andolschek*, 142 F. (2) 503.

This pronouncement by the Court below is deemed in conflict with applicable decisions of the Supreme Court.

V. The Court of Appeals erred in approving the rejection by the trial court of every one of the requests to charge, sustaining the brief charge of the trial judge as adequate, despite its brevity, confusion, inaccuracies, contradictions and fundamental omissions, but pointing out "It is true that in many jurisdictions such requests are taken more seriously than we take them" (op. p. 2262).

This ruling is in apparent conflict with the applicable decisions of the Supreme Court. See *Thorwegan* v. *King*, 111 U. S. 549.

Cf. *Bruno* v. *U. S.*, 308 U. S. 287, 92 (1939).

VI. The Court of Appeals, Second Circuit, by its attitude toward the "harmless error doctrine"[7] evidences not only

[7] See *U. S.* v. *Liss*, 137 F. (2) 995 and the discussion by Jerome Frank, J. in the dissenting opinion at p. 1001.

difference with the other Circuits, but is in apparent conflict with the applicable view of the Supreme Court in *McCandless* v. *U. S.*, 298 U. S. 342; and in the light of its employment of the "harmless error doctrine", erred in adjudging as not reversible, important, substantial and prejudicial errors, urged by appellant.

VII. The Court of Appeals erred in ruling that there was no material variance between the indictment and proof, and despite the variety of conspiracies, holding that there was no misjoinder or practical prejudice to the appellant, under the doctrine of *Berger* v. *U. S.*, 295 U. S. 78 [8]—thus expanding the doctrine of the *Berger* case into a grotesque distortion of what it purported to assert.

VIII. The Court of Appeals erred in ruling that since, as a practical alternative, persons charged with conspiracy must either be subjected to a joint prosecution, and thereby suffer the possibility of an unfair trial or, on the other hand obtain immunity, the accused cannot expect immunity but must accept that risk, including the danger of an unfair trial.

This doctrine, we submit, is violative of the spirit and letter of the Constitutional guarantee of a fair and impartial trial. A forthright expression of opinion on this basic principle is needed, lest the views of the Second Circuit, in this regard, become the basis of an unsavory precedent in the pursuit of mass prosecution.

IX. The Court of Appeals erred in failing to hold as reversible error, as to appellant Cohen, the receipt in evidence, and the reading *verbatim* to the jury of the legal

[8] It is believed that just as in *U. S.* v. *Mitchell*, 322 U. S. 65 where the Supreme Court granted *certiorari* "in view of the importance to federal criminal justice of proper application of the *McNabb* doctrine", so in the instant case the Supreme Court should in the public interest grant *certiorari* in view of the importance to federal criminal justice of proper application of the *Berger* doctrine.

opinion of the Circuit Court of Appeals (10th Cir.) in the wholly unrelated mail fraud trial respecting the conviction therein of the co-defendant, Joel Rosenberg for a similar type of mail fraud, and which was reversed on appeal. (*Rosenberg* v. *U. S.* (10th Cir.), 120 F. (2) 935.)

X. The Circuit Court of Appeals erred in holding as non-reversible error (although concededly "improper"), the mode of interrogation adopted by the prosecutor in cross examination of appellant (and approved by the trial judge), by which he imputed by the affirmations in his questions, criminal convictions to the employees of the appellant.

XI. The Circuit Court of Appeals erred in failing to hold, as jurisdictionally fatal, and as reversible error, the ruling of the trial court, in violation of the fundamental constitutional rights of the accused, permitting to the prosecutor a private *ex parte* argument on defendant's motion to inspect papers in the government's possession, and excluding the defendants and their counsel from such argument—thus denying to the accused the basic right to be present in person, or by counsel, through every phase of the trial.

XII. The Court of Appeals erred in failing to rule that the conviction of appellant on Count I, based merely on the uncertain, self-contradictory opinion of a witness, as to mailing in the Southern District of New York, (there being no envelope) was erroneous because of the inadequate evidence as a matter of law. The lack of proof was jurisdictionally fatal since proof beyond a reasonable doubt as to the mailing in the district was the *sine qua non* for a verdict of guilt.

XIII. The Court of Appeals erred in failing to determine as reversible, the following errors of the trial court

(which were urged as substantial in the court below, but which were not discussed in the opinion):

(a) in deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein was for the jury to determine;

(b) in receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme;

(c) in permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy;

(d) in restricting and destroying the value of cross examination of government witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and

(e) in admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.

VII

Conclusion

Wherefore, your petitioner prays that a *writ of certiorari* issue to the United States Circuit Court of Appeals for the Second Circuit, to the end that this cause may be reviewed, and that the judgment of said Circuit Court of

Appeals be reversed, and the petitioner be granted such other and further relief as may be proper.

Dated, New York, N. Y., November 7th, 1944.

JOSEPH COHEN,
Petitioner,
By WALTER BROWER,
Counsel for Petitioner.

ILO ORLEANS,
COLEMAN GANGEL,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 699

JOSEPH COHEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Prefatory Remarks

In this mass prosecution (75 defendants), under the guise of a single mail fraud (200 separate conspiracies were proved), the long and complicated trial (7 months), with its tremendous record (over 16,000 pages and 4,000 exhibits), presents crucial questions of law—as to some of which, the court below points out, there is diversity in the circuits.

Counsel is aware that *certiorari* will not issue merely to rectify error in a particular case, unless fundamental questions of law or policy are presented. Both are before the Supreme Court on this record.

We believe that beyond the clash of opinion on important legal principles, there is involved in this case a deeper,

a more profound problem of policy—which strikes at the very roots of the entire democratic process—that is, whether, in the administration of the criminal law, mass prosecutions, as typified by this trial, are to be countenanced and tolerated.

It is the firm conviction of counsel that the appellant has been the unfortunate victim of a most shocking, un-American type of trial; that it was only because of the mass prosecution, following a "dragnet" indictment, that the accused, Joseph Cohen, was tarred and feathered with the infamy and the sins of the many disreputable malefactors who were made his co-defendants.

It is respectfully prayed that this court, in granting a review of this extraordinary trial, should not restrict appellant to specific legal propositions which require dispositive determination. Rather, it is urged, that there be scrutiny of the entire record, so that, in appraising the canvas as a whole, it may be seen whether a fair and impartial hearing was, or could have been, achieved in this prejudicial atmosphere. On the basis of this record we contend that deprivation of liberty for seven years constitutes a shameful and flagrant denial of justice.

We believe that the time has come for the Supreme Court to put a halt to the tortured construction that has been placed upon the doctrine of "immaterial variance", as expressed in *U. S.* v. *Berger,* 295 U. S. 78, and which in its practical application, as now sanctioned by some lower courts, is producing a veritable perversion of justice.[9]

We respectfully submit that the administration of justice is bound to fall into the depths of disrepute unless the Supreme Court, in clear, stern notes speaks out now, in condemnation of mass prosecutions. We cannot read *U. S.* v.

[9] See dissenting opinion of Jerome Frank, J. in *U. S.* v. *Liss,* 137 Fed. (2) 995, 1001 *et seq.* with its eloquent denunciation of mass conspiracy trials.

Berger as intended, or calculated to commend the practice that has since grown so prevalent, of herding a great number of defendants into court on the charge of a single conspiracy, and when the proof discloses a variety of small unrelated and non-connected conspiracies, with different defendants, different subject matter, different locales, and different proof, and *no proof as to the single conspiracy charged in the indictment,* of then approving consequent verdicts of guilt, on the theory of "immaterial variance".

The history of such prosecutions, within recent years, has finally culminated in the instant monstrous proceeding, which appears to be the largest and longest criminal conspiracy trial in the annals of the Southern District of New York—and so far as counsel is aware, a longer and more intricate trial than has ever been reported in the books. We confidently believe that this Court will recognize the pre-eminent importance of forthright judicial assault upon this travesty on justice.

By reversing this judgment this Court will demonstrate that in the criminal law there dare not be a caricature of a "day in court" or of a "fair and impartial trial." Injustice, such as was here fashioned, should be stamped out as undemocratic, as violative of fundamental liberties—for it is only a step from this kind of judicial procedure to tyranny and oppression.

II

Opinion of the Court below

The opinion of the Circuit Court of Appeals for the Second Circuit is, as yet, unreported. It is annexed to the certified transcript of the record filed herein.[10] A copy of the opinion is hereto annexed as Appendix A.

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[10] The Record in this case, consisting of 16,000 pages which, by order of the Court below, was reduced to 12,000 pages, together with 4,000 exhibits, has not been printed. The stenographic transcript, as used in the Court

No opinion was rendered by the United States District Court for the Southern District of New York.

III

Jurisdiction

The jurisdiction of this Court is based upon Judicial Code, Sec. 240 (a), as amended by the Act of February 13, 1925, U. S. C. Title 28, Section 347 (a) and Rule XI of the Rules of Practice and Procedure in Criminal Cases promulgated by this Court May 7, 1934.

Date of Entry of Judgment and Denial of Petition for a Rehearing

The judgment sought to be reviewed was entered on October 18, 1944. The Court of Appeals, by order dated October 10, 1944, denied a petition for a rehearing.

IV

Statement of the Case

The summary statement of the case is set forth in the petition, and is therefore not here repeated, but is referred to for adoption as part of this brief. A summary of the argument is set forth in the Index.

V

Specification of Assigned Errors to be Urged

It is intended to urge all the errors assigned (R. 12776-13213), including the following rulings of the Circuit Court of Appeals:

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below, has been certified to this Court. A motion accompanying this application for *certiorari* prays for leave to present this cause upon the Record as certified by the Circuit Court of Appeals in stenographic form. A printed copy of the opinion of the Circuit Court of Appeals is annexed to and made part of the Record.

1. that there was no prejudice to appellant in being forced to trial in this mass prosecution; and that he received, in the seven months' trial, a fair and impartial hearing as guaranteed by the Constitution;

2. that Sec. 557 of Title 18, U. S. Code, permits the joinder of crimes when the accused are different;

3. that the Statute of Limitations is not a bar to a conspiracy in which the last overt act found was more than the statutory period prior to the indictment;

4. that appellate scrutiny need be no more exacting in a criminal than in a civil case, and that evidence sufficient to support a civil verdict will support a criminal one;

5. that the rejection of all the requests to charge was proper, and the trial charge, despite its brevity, was sufficient and complete, and that the trial court had not "forgotten something substantial;"

6. that there was no error in denying a severance or mistrial at any time during the trial, despite the elements of prejudice and danger, recognized, but minimized, in the opinion below;

7. that *Berger* v. *U. S.*, 295 U. S. 78, is authority for sustaining the propriety of this trial as one in which there was immaterial variance; and that there was no practical prejudice to the accused;

8. that a defendant accused of conspiracy must bear the risk of an unfair trial; and despite that danger, is not entitled to severance or immunity;

9. that there was no prejudicial error in reading *verbatim* to the jury, and admitting in evidence, an opinion of the Circuit Court of Appeals in the wholly unrelated mail fraud case of *Rosenberg* v. *U. S.*, 120 F. (2) 935;

10. that the prosecutor's mode of interrogation, in the cross examination of appellant, imputing by affirmations in his questions, criminal conviction to the employees of appellant, was "improper," but did not constitute reversible error;

11. that as to other objections urged, even if errors (and not discussed), the Court would not because of them "reverse convictions so just upon the merits," thereby betraying the refusal of the Second Circuit to apply "the harmless error doctrine" in conformity with the rule as laid down in the Supreme Court and the Fifth, Seventh, Eighth, Ninth and Tenth Circuits.

In addition to the foregoing specifications, here listed *seriatim*, counsel respectfully incorporate herein by reference, and adopt as part of this brief, the items listed in the annexed petition under the captions: "Questions Presented" and "Reasons for Allowance of Writ," together with the matter and references appearing in the footnotes thereunder.

VI

ARGUMENT

In this brief, no attempt is made to go into a detailed analysis of the unwieldly factual situations, since it is believed that little assistance will thereby be furnished to the Court for the purpose of determining whether *certiorari* should issue. Discussion will be limited solely to the legal problems which cut right through the mass of factual data, and which the opinion of the court below suggests to be of major consideration, inviting solution by the Court of last resort.

A summarization of the several points of law, hereinafter discussed, will be found listed in the Index under the caption: "Argument".

Point I

The Appellant Cohen by This Mass Prosecution, Was Denied His Constitutional Right to a Fair and Impartial Trial

No reported case, so far as counsel have been able to ascertain, is comparable to this extraordinary trial, for length of time consumed. It is *sui generis*, in that it lasted more than seven months—from August 4, 1941 to March 8, 1942—based upon an indictment of seventy-five defendants.

In complexity of issues, in variance of proof from indictment, and in the involvement of so many defendants on a so-called single scheme (which was neither proved nor provable), but which developed into two hundred conspiracies and over five hundred fraudulent transactions, this trial, with its multitudinous ramifications, proved to be incredibly unjust to the accused. It seems to be the embodiment of what is characteristically un-American in legal procedure.

Defendants, having such a long trial in prospect, with a protracted ordeal ahead, and the nightmare of burdensome expense—deprived, in the meantime of an opportunity to earn a living, must be overwhelmed by a sense of hopelessness and futility in achieving the semblance of a proper defense.[11]

[11] The confusion and multiplicity of issues in this trial led to the result that few lawyers in the case attended throughout the trial. Lawyers came and went. Some defendants who started with the aid of counsel, were soon serving *pro se*. Many lawyers absented themselves from time to time during the trial for the reason, as stated by the prosecutor:

> "I think the record should show that almost every day of the trial a few counsel are absent from the courtroom when the testimony does not relate specifically to their defendants." (R. 4220)

This is a strange commentary upon this trial when the need of alert and experienced counsel seemed so imperative. How could attorneys be, even on occasion, dispensed with, in face of the fact that the court throughout the trial was constantly and persistently admitting evidence as binding upon each and every defendant?

A mass prosecution of this type—calculated to dispose of a tremendous aggregation of men in one fell swoop, by some process of mob hysteria, is only identifiable with what we have heard about in Fascist Italy and under the forces of tyranny across the seas.

Does not this militate against our whole traditional concept of personal guilt—in the hope that by proper administration of the criminal law, an innocent man shall never be convicted through a callous indifference as to the fairness and integrity of the trial to which he is subjected.

Little wonder, then, that there were numerous pleas of guilty before, and at the eve of, and during the course of the trial. These pleas constituted a flight, by the hope of suspended or relatively slight sentences, from the practical reality of the tangled web, in which the defendants were enmeshed; from which otherwise escape was well nigh impossible. Attempted defense was fraught with burden, danger and expense beyond the endurance and means of most men.[12]

And, is it an idle question to ask, why this fate must be visited upon any single accused—to be made the victim of the sins of a lifetime of seventy-five men, all indicted conjointly with him? Why was it essential to have one trial with more than half a thousand fraudulent transactions (as to most of which an accused has no connection

[12] The following statement by the trial court, recognizing the hardship of mass prosecution, and that in ability to defend stimulated pleas of guilty, is very illuminating (R. 8716-7):

> "The Court: I will grant you this, that I think there is a reaction to some degree to these mail fraud statutes (cases) becoming too encompassing—and getting where they may be beyond human endurance, in the way of trial, or beyond human ken in the way of appreciation. • • • I will grant you that. There are varying views among the judiciary for separate indictments and strongly so. • • • The main division of thought is, whether to keep the people in court and let them answer, whether you are going to bargain on the conscience of a person."

or knowledge), paraded before a jury, to the end that every shred of this evidence shall be binding not only upon those shown to be involved, but upon everybody on trial, including appellant—with the inevitable likelihood that the guilt of others will engulf him as well.[13]

The welter of prejudice in the instant case, and the dangers of joint trial, by far exceeded that which was determined to constitute reversible error in *U. S.* v. *Haupt* (7th Cir.), 136 F. (2) 661, — where there was no such complexity of issues or length of trial, as we have here.

In the *Haupt* case, six defendants were brought jointly to trial for treason. The grounds there asserted by the Appellate Court for making reversal mandatory, are no less applicable in the case at bar. It was pointed out that while the matter of severance is for the trial court's discretion, it is subject, however, to review if abused. The court made it clear that even if, at the outset of the trial, the reasons may not seem clear, a severance must be granted even at the end of the trial, when the need appears.

[13] That the theory of one joint scheme was more fiction than fact is evidenced by the following episode at the trial: The defendant, Grow, after the trial had progressed five months, moved for dismissal of the indictment as to him, and to which the prosecution consented, making the following startling assertion:

> "that while there is evidence showing that Mr. Grow did in fact defraud certain customers, there is no evidence showing in his case alone that he was part of the scheme and that he conspired." (R. 8827).

Yet it is demonstrable from the record that the type of testimony involving Grow, and the surrounding circumstances were quite the same with respect to him as the government utilized in prosecuting the other defendants. The frauds were no less individual in other cases than in the case of Grow; and if the alleged conspiracy or conspiracies truly encompassed all the defendants, as the government contended, then the web included Grow no less than it did the others. Justification for the dismissal of the indictment as against Grow could with equal logic be applied in the case of every other defendant—thus relegating them to answer for their alleged frauds in the state courts.

Two types of testimony admitted in the *Haupt* case, (1) to show "background", and (2) incriminating statements offered only as against individual defendants, presented the same basis for objection that we have here—except that in the instant case the prejudice was aggravated by the ruling of the Court *that the evidence was binding on all defendants.* The Seventh Circuit held that both types of testimony were bound to prejudice the other defendants, and that not only a jury, but *even a court* could not be counted on to allocate the damaging testimony to the proper defendant, and to the exclusion of the others, stating as follows, at p. 672:

> "We doubt if it was within the realm of possibility for this jury to limit its consideration of the damaging effect of such statements merely to the defendant against whom they were admitted. We have equal doubt that any jury, or for that matter any court, could perform such a herculean feat.
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> We are unaware of any procedure which the trial court could have devised, other than a severance, by which these incriminating statements could have been introduced against the defendants making them, without seriously prejudicing the rights of other defendants."

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at p. 673,

> "Here again, this background testimony as to each defendant was offered only as to that particular defendant and the jury was instructed that it was to be only so considered. We seriously doubt, however, if it was possible for the jury to limit its damaging effect to the particular defendant against whom it was admitted."

A severance, in the interest of common fairness and simple justice was, we submit, mandatory in the instant case.

The language in the *Haupt* case on this subject is apposite (p. 673):

> "However, after the trial and all of the evidence as to the so-called background of certain defendants had been heard and the fourteen incriminating statements admitted and the overt acts had been considered, the defendants, by motion for new trial, again appealed to the trial court's discretion to relieve them of the unfair and prejudicial consequences of a joint trial. Then the court had to consider the task of the jury, which had to keep separated in its mind the involvement of the various defendants in the numerous overt acts, to eliminate from the incriminating statements those parts which involved defendants other than the one against whom such statement was admitted, and to consider only as to such defendant the acts and utterances comprising the so-called background testimony as it related to such defendant. We think that if these facts had been known to the trial court at the time the motion for severance was made, it would have been an abuse of discretion for the trial court to have refused a severance. When presented again in the motion for a new trial when all of these facts and circumstances were known to the court, it was likewise an abuse of discretion to overrule such motion and thus refuse to remedy this prejudicial procedure."

The appellant Cohen was helpless in the labyrinthine ramifications of this case and the multiplicity of transactions put in evidence, although factually over ninety per cent of the record did not even purport to involve him in any way whatsoever. Caught in the quagmire of variance, misjoinder of offenses and of defendants, admission of evidence of offenses with which he had no connection, which were barred by limitation, which took place beyond the court's jurisdiction, appellant was branded with all of this because, though involving other defendants, and offered to show "association" and "background" (as stated by the

court and prosecution), it was made binding upon all the defendants, including Cohen, and yet, not even in the remotest fashion, related to him.

Surrounded by this mountain of prejudice, Cohen was doomed in advance to a verdict of guilt. It is our contention that long before the trial had reached its advanced stages, the need for severance should have been crystal clear to the court, and should have been directed, if not on the court's own motion, then clearly on the application of the appellant, during or at the end of the trial.

The trial judge himself was aware that the limitations of memory made analysis of the case by the jury quite impossible, stating:

> "• • • *when you get to a case of this character, with 29 counts, with 70 or 75 or 80 defendants, and then a generalized count of conspiracy, we have to measure human memory. The Court has to consider that the human mind is able to retain just so much. Very few of us could be on that jury and skeletonize that case at that end of four or five weeks without any notes. I have known very few lawyers that could even make an argument to the jury after having been in court for several weeks.*" (R. 499) (Emphasis supplied).

A reading of the entire record will demonstrate, beyond the peradventure of doubt, that the poison injected into this trial day after day, by these numerous episodes of fraud and wrongdoing, left it humanly impossible for the jury to appraise and apply the testimony, without visiting the wrongs of one upon all the others.

The substance of appellant's contentions, as outlined above, have thus been expressed in *Marcante* v. *United States*, 49 F. (2) 156, 158 (10th Cir.):

> "Furthermore, the practice of submitting to a Jury, in one trial, the question of the guilt of thirty or fifty citizens, where the testimony as to each is different,

> is not to be encouraged. It is extremely difficult for an experienced trial judge to trace the skeins of scattered testimony to so many individuals; with inexperienced jurors, such complicated testimony is too apt to become a confused jumble, and a verdict too apt to represent an impression that the defendants are guilty of something, with little reference to the crimes with which they are charged."

The menace of mass prosecution was warned against by L. Hand, J., only a few years ago in *Falcone* v. *U. S.* (2nd Cir.) 109 F. (2) 579.

In *U. S.* v. *Liss*, 137 F. (2) 995, Jerome Frank, J., in his outspoken dissent, states, at p. 1004:

> "But a trial even for a single conspiracy is complicated. The complexity of such a trial should not be increased by needlessly injecting into it the trial of another conspiracy. *More ought to be done, I think, to prevent prosecutors from employing the excuse of need for 'expedition' to use, unnecessarily, conspiracy trials, in which large numbers of defendants are herded into one suit, instead of bringing several actions.* The trial dockets are not so congested as to compel such omnibus trials."

The Supreme Court, it is believed, will discern the overpowering injustice and evil in mass prosecution, and the very real danger that innocent men may easily be sucked into the vortex of guilt by such a trial.[14]

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[14] Counsel will not here present a detailed discussion of the extreme prejudice caused by the malicious deportment and vituperative tirades of the witness, Mussman, against both appellant and appellant's counsel, Mussman's reprehensible tactics did not escape the notice or appraisal of the Court of Appeals (op. pp. 2247, 2257, 8). That there was thereby created an unfair trial for the appellant can be discerned from a reading of the record of Mussman's *six weeks of testimony of over 3,000 pages*. In this way only, can there be gained the fullest appreciation of the venom and spleen of this witness, who had admitted a long life

On the basis of this record disclosing a wide departure from well established and well recognized judicial principles, it is urged that the Supreme Court exercise its supervisory power to rectify the grave errors of these proceedings.

POINT II

A Mass Prosecution of Nonrelated Conspiracies, with a Misjoinder of Defendants and of Offenses, Cannot be Justified under the Doctrine of Berger v. U. S., 295 U. S. 78. The Variance in the Instant Case Was Clearly Material, and Reversal is Mandatory Because of the Obvious Practical Prejudice to the Accused

It is believed that the most grievous legal error in this entire case is the tortuous construction that has been given to the doctrine of immaterial variance in *Berger* v. *U. S.*,

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of crime, and his ruthless program calculated to crucify appellant for his own sordid purpose.

Mussman was handled by the court, not without solicitude, and was subjected to practically no restraint—an added aspect of prejudice which the record clearly discloses.

The analysis of the court below of this phase of the trial, in the following language, is bewildering:

> "Next as to the conduct of the judge. It is true that he put little or no restraint upon Mussman; but no harm could have come from that. He was a confessed, unblushing rogue, admittedly concerned with making a case against the accused, partly in the hope of leniety for himself, partly apparently from malice. His outbursts of violent abuse against them may well have been so unseemly that, in the interests of decorum alone, the judge should have checked him; *but it is extremely unlikely that they hurt the accused a particle.*"

The conclusion of the Court of Appeals that all this abuse was inconsequential and unprejudicial, and that, as for Mussman's epithets, "it is extremely unlikely that they hurt the accused a particle", is most perplexing. That certainly is "*unverified and unverifiable guessing*" (per Jerome, Frank, J., in his dissenting opinion in *U. S.* v. *Liss*, 137 F. (2) 995, 1003). This conclusion, we submit, betrays the disinclination of the Second Circuit to reverse even for substantial error—a subject which is more fully discussed under Point VIII, *infra*.

295 U. S. 78, as justification for this mass trial. From a relatively innocuous beginning, in which the Supreme Court held that two related conspiracies involving the same defendants would not be deemed prejudicial variance although the indictment alleged one conspiracy, the lower courts have now metamorphosed the principle into a concept that has become incredibly grotesque.[15]

Detailed discussion surely is not needed to demonstrate the great contrast and distinction between the *Berger* case and the case at bar. Surely it is a far cry from the simple type of variance in the *Berger* case to a prosecution, such as we have here, of seventy-five defendants, and offering, as the proof under an indictment alleging a single conspiracy, evidence involving five hundred transactions with respect to over two hundred conspiracies. Even in the most optimistic view taken by the Government, as suggested by the Court of Appeals, there were a number of conspiracies that may have interpenetrated, and yet the conspirators in each conspiracy were concededly wholly different.

It is time, we submit, for the Supreme Court to set up some guide or standard to establish the limitations of the doctrine of immaterial variance asserted in the *Berger* case.

Surely the *Berger* case was never intended to serve as authority for the proposition, as the 2nd Circuit has implied by sustaining the convictions here, that under an indictment alleging a single conspiracy there is immaterial variance where the proof develops that there are many conspiracies (a) some, if not all of which, are unrelated; (b) some are barred by the Statute of Limitations;

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[15] Not one of the ten cases cited by the Court below (op. p. 2252, footnote), as instances of how the *Berger* case has, in practice, been followed, remotely resembles the instant case in complexity of indictment, or issues, or totality of defendants, or of conspiracies, or of offenses joined.

(c) some occurred beyond the court's jurisdiction; (d) some are not Federal offenses at all, because no use of the mails was made or intended; (e) in which, severally, the defendants are different; (f) the proof with respect to which is not the same in each instance.

Such type of joinder has been condemned and held reversible in many cases of which the following are examples:

U. S. v. *McElroy*, 164 U. S. 76;
Coco v. *U. S.* 289 F. 33 (8th Cir.);
Wilson v. *U. S.* 109 Fed. (2d) 895 (6th Cir.);
Ventimiglio v. *U. S.* 61 Fed. (2d) 619 (6th Cir.);
U. S. v. *Siebricht*, 59 Fed. (2d) 976 (2nd Cir.).

The Supreme Court did not and could never have intended the doctrine of immaterial variance to get so far out of hand as to be utilized as authority to justify the instant mass prosecution. The instant case, which has become a *cause celebre* for length of trial and complexity, should not, we submit, under the aegis of the *Berger* case, become a precedent for prosecutions more evil in design, and compass and effect.

Point III

The Court of Appeals Erred in Ruling (Concededly Contra to the Great Weight of Authority) That the Statute of Limitations is Not a Bar to a Conspiracy in Which the Last Overt Act Found Was More Than the Statutory Period Prior to the Indictment

For the purpose of the present application for a writ of *certiorari*, perhaps little need be added to the discussion of this subject beyond that contained in the opinion of the court below.

According to L. Hand, J., this is the question "*which raises the only really important doubt in the whole trial*", (op. p. 2262), and his opinion states:

> "The accused argue that, since the judge did not take these four [16] acts away from the jury, it is possible that the only acts they found were these, or some of them; and that, if so, the statute was a bar, because it begins to run from the last overt act found. *This argument is formally good, if the law is good, and there is undoubtedly authority for the proposition that the period does so run*" (emphasis supplied).
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> "It must be owned that there is a body of authority, as we have said, that the statute of limitations runs from the last overt act which has been proved. In addition to early decisions in the district and circuit courts, the Eighth Circuit has so declared in *Ware v. United States*, 154 Fed. Rep. 577, and in *Culp v. United States*, 131 Fed. (2) 93, 100; so has the Ninth in *Jones v. United States*, 162 Fed. Rep. 417, 425 and in *Hedderly v. United States*, 193 Fed. Rep. 561, 569; and so has the Court of Appeals of the District in *Lorenz v. United States*, 24 App. D. C. 337, 387. Indeed, in *Brown v. Elliott*, 225 U. S. 392, 401, a passage to that purport from *Lonabaugh v. United States*, 179 Fed. Rep. 476, was quoted with apparent approval. However, all these decisions were upon records where there had been an overt act within the statutory period, and where it was therefore not necessary to decide the point. The only decisions that we have found in appellate courts, which demanded a decision on the point are two in the Eighth Circuit: *Lonabaugh v. United States* which we have just cited, and *McWhorter v. United States*, 299 Fed. Rep. 780, which curiously enough, did not cite *Lonabaugh v. United*

[16] The reference to "four acts" is an error of the lower court. There were *five*, being overt acts 1, 2, 3, 4 and 29; each of them dated before September 30, 1935.

States. On the other hand we cannot read *Kissel v. United States,* 218 U. S. 601, in any other sense than as contrary to such a notion" (op. p. 2263).

It will be seen from the foregoing that the great weight of authority is concededly contrary to the position that has been asserted by the Second Circuit. We submit that there is no suggestion in any case of conspiracy, reported in the books, in recent years (outside of the opinion of the Second Circuit in the instant case), which casts any doubt upon the well established rule that the Statute of Limitations runs from the last overt act which has been found.

The paramount importance of this whole question in the instant case arises out of the crucial rulings of the trial judge, during the trial and in his final charge, to the effect that *any* defendant could be found guilty upon *any one* of the overt acts. The Court refused to withdraw from the jury *any one* of the overt acts, not excluding the five in question which were all laid before September 30th, 1935.

Since, as a matter of fact, *only seven* of the overt acts were linked with the appellant Cohen (despite the factual misconception involving him with many others, asserted in the opinion), the likelihood was much more than theoretical,—in fact it was highly probable—that the *appellant Cohen was indeed adjudged guilty on the basis of one of these outlawed overt acts.* Hence L. Hand J.'s observation that "the possibility was so remote as to have the least possible practical importance" is an unfortunately grave inaccuracy.

The cogent reasons as above stated, and as the court below has discerned, demonstrate that the validity of the conviction on the conspiracy count, depends upon the proper applicable rule with regard to the Statute of Limitations.

Counsel for the appellant is of the view that the lower court's thesis for upsetting the law on this subject is entirely untenable, in view of the state of the statutory law that the mere conspiracy is not a crime, and that only the overt act, when done, makes the conspiracy a crime. *The logical conclusion, following L. Hand J.'s reasoning would be to assert that there is no statute of limitations at all in conspiracy cases.* For the purpose of *certiorari,* it should suffice to observe that the great weight of authority, including *Brown* v. *Elliott,* 225 U. S. 392, supports the pronouncement on this subject which is in direct contradistinction to that which was enunciated by the court below.

The Supreme Court, in *Brown* v. *Elliott,* (as L. Hand, J. below, observed) quoted the following, with apparent approval, and with copious citation, from *Lonabaugh* v. *U. S.,* 179 F. 476, in the course of its opinion, 225 U. S. 392, at p. 401:

> "And where, during the existence of the conspiracy, there are successive overt acts, *the period of limitation must be computed from the date of the last of them of which there is an appropriate allegation and proof,* and this although some of the earlier acts may have occurred more than three years before the indictment was found" (emphasis supplied).

The views of L. Hand, J. with respect to *Kissel* v. *U. S.,* 218 U. S. 601, as specifying "a contrary notion", seem quite untenable since the *Kissel* case itself is analyzed by the Supreme Court in the course of its opinion in *Brown* v. *Elliott,* 225 U. S. 392. Surely the Supreme Court cannot be deemed to quote with "apparent approval" the well recognized rule as to the Statute of Limitations commencing to run from the last overt act, and then, without suggesting a contrary thought or view, to consider that principle

as nullified by implication through the discussion of the *Kissel* case which does not involve the question of either conspiracy or overt acts.

Point IV

The Court of Appeals Erred in Ruling That Section 557 of Title 18, U. S. Code, Permits the Joinder of Crimes When the Accused Are Different, a View Which is Concededly Contrary to That Adopted in the Eighth Circuit and With Regard to Which There Has Been Dissent in the Second and Seventh Circuits

The court below, in an effort to justify the variance at the trial as immaterial, suggests that instead of the single conspiracy alleged, there were three conspiracies, and then raises the question whether the variance was material because the alleged conspirators were not the same in all.

L. Hand, J. points out in the opinion below that there is a diversity of decision in the Circuits. His discussion on the subject is as follows:

> "For this reason, as we pointed out in *United States v. Liss*, supra (137 Fed. (2) 995), the problem is strictly speaking rather one of joinder under § 557 of Title 18, U. S. Code. The case at bar is an apt example of just that; and the question is the same as though all three supposititious 'schemes' had been pleaded as separate counts. Certainly they would have been crimes of the same kind, and, for the reasons we have given, their joinder would have certainly been 'proper,' unless for the fact that the confederates were not the same in all. It is true that the Eighth Circuit in *Coco v. United States*, 289 Fed. Rep. 33, held that § 557 did not permit the joinder of crimes when the accused were different, but we held the opposite in *United States v. Twentieth Century Bus Operators*, 101

Fed. (2) 700, and so has the Seventh Circuit, though by a divided court (*United States v. Tuffanelli*, 131 Fed. (2) 890, 893, 894)." (op. p. 2252, 3)

That there is real clash of authority is obvious from the fact that while the Eighth Circuit clearly holds that a joinder of crimes is not permissible when the accused are different, both in the Second and Seventh Circuits, the opinions cited for the opposite view, are in each case by a divided court.

In *U. S.* v. *Tuffanelli*, 131 Fed. (2) 890, the dissenting opinion is by Major J. and his main reliance is upon *McElroy* v. *U. S.*, 164 U. S. 76. In the Supreme Court the law was thus stated in *McElroy* v. *U. S.*, 164 U. S. 76, at p. 81:

> "While the general rule is that counts for several felonies of the same general nature, requiring the same mode of trial and punishment, may be joined in the same indictment, subject to the power of the Court to quash the indictment or to compel an election, such joinder cannot be sustained where the parties are not the same and where the offenses are in no wise parts of the same transaction and must depend upon evidence of a different set of facts as to each or some of them. It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions."

The law on this subject, as discussed in the portion of the opinion by L. Hand, J. above quoted, should suffice to indicate that here is a major question of criminal law which requires exposition and solution by the Supreme Court.

Point V

The Circuit Court of Appeals Erred in Holding (Concededly Contrary to a Body of Substantial Authority), That Appellate Review Need Be No More Exacting in Criminal Than in Civil Cases

The Circuit Court of Appeals asserts the arresting proposition that the same evidence which will support a civil verdict will be sufficient to support a criminal verdict; and that appellate scrutiny need be no more exacting in either type of litigation.

While pointing out that "*there is indeed authority for that position*", the Second Circuit does not accept that principle. Relying on two of its prior decisions (*Feinberg* v. *United States*, 140 Fed. (2) 592, 594 and *United States* v. *Andolschek*, 142 Fed. (2) 503, 504; opinions written by L. Hand, J.), the Court below holds that it is wrong to "*assume that an appellate court, before affirming a verdict in a criminal case, will demand that the evidence shall be more cogent and persuasive than when reviewing a civil verdict*: i. e. *that, since the jury must be satisfied of the accused's guilt beyond a reasonable doubt, an appellate court will more straitly scrutinize the evidence necessary to sustain the verdict*". (op. p. 2245).

We believe that the mere statement of this proposition, thus asserted in the opinion below, suggests the profound importance of the question; and that in view of the recognition that there is authority *contra*, a restatement of the law on this subject would be valuable and timely.

It is the view of counsel for the appellant that the concept of appellate appraisal, as expressed by the Second Circuit, is fundamentally unsound; and that in this case, it cast its aura over the entire panorama of this exceptional

trial. Clearly it affected the psychological approach of the appellate bench in examining the trial proceedings—to the obvious detriment of the accused. The problem of appellate review is of no mere academic importance. It is a basic one that plumbs the depths of the court's reaction to the record as a whole.

The determination of what constitutes proper and appropriate appellate analysis in a criminal cause, in which life and liberty are at stake, is a matter of first importance in the administration of justice, and constitutes a subject which merits the deliberative consideration and exposition of guiding rules by the highest court in the land—particularly when, as the opinion below indicates, there is a body of contrary authority.

Point VI

In Ruling That Since, As a Practical Alternative, Persons Charged With Conspiracy Must Either Be Subjected to a Joint Prosecution and the Danger of an Unfair Trial, or, on the Other Hand, Obtain Immunity, and That Therefore the Accused Must Accept That Risk, the Second Circuit Expresses a Doctrine Which is Violative of the Constitutional Guarantee of a Fair and Impartial Trial

The Court below, in its opinion, states:

> "The chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none." (op. p. 2268)

We submit that the foregoing pronouncement of the court below is utterly unsound, and should not be sanctioned by the Supreme Court.

To say that an unfair trial may have to be condoned, accepted and justified in joint trials for conspiracy is to

recognize a new and treacherous departure from well established and traditional safeguards in the criminal law.

The opinion below asserts:

> "We are dealing only with the chance, and chance alone it is, that a jury may fail to distinguish between the guilty and innocent; and in deciding the importance of that chance, we must not disregard the only available alternative." (op. p. 2257)

The Constitution guarantees a fair and impartial trial. To this the accused is entitled as a matter of right. *There is no alternative.* No consideration or circumstance or condition can justify the opening up of any avenue for the curtailment of this basic right under the Constitution. If there is not fair trial, a verdict must be set aside. *If there can be no fair trial,* then the demands of American justice are that the accused be immune. The innocent may not be forced to suffer from being linked by the government with the guilty. The inherent vice in mass prosecution is the foisting of the guilt of demonstrably guilty men, by a form of legal osmosis, upon a host of others, who are herded *en masse* into a single trial for the convenience of the prosecutor. It will not do for the courts to shrug their shoulders and say that an unfair trial is unavoidable. The fact is that in this case severances were granted, and many more could, and should have been, granted.

Immunity, in these cases, is in fact but a myth. Much of what passed before the jury consisted of violations of State laws. None of the accused, in truth, need have been immune from punishment for their malefactions. But in common justice, they would have been tried for their *own* crimes, if they were indicted separately, or in very small groups.

There is no imperative need to bind up a variety of simple mail frauds with an omnibus conspiracy count.

Whether the defendants were tried for mail fraud in the Federal Courts or for cheating in the State Courts, there would never have been required for these seventy-five defendants seven months of trial. There would have been instituted a series of smaller trials, lasting a few days each. And beyond that, and what is more important, there would have been obviated the danger which applied to most defendants, for to them the involvement in a single gigantic scheme was pure fantasy, and yet the futility and burden of a proper defense, of necessity, constituted a veritable nightmare.

The jury should determine the guilt of an accused not upon the basis of the unsavory background of his co-defendants, or of his alleged association with others. Jurors are human, and because of the limitations of memory and discrimination they may, no matter how well intentioned, as a result of such a morass of evidence, paraded in a long steady stream before them for over one-half a year, inevitably visit the guilt of some upon all.

Point VII

The Court of Appeals Erred in Approving the Ruling of the Trial Judge Rejecting in Toto All Requests to Charge, Though They Correctly Stated Principles Applicable to Crucial Phases of the Trial, and Not Embraced in the Main Charge. In Adopting This Policy (Concededly Contra to That Applied in Other Jurisdictions), the Court below Expressed a Doctrine Which Paves the Way for a Precarious Curtailment of the Rights of an Accused

The Judge's charge which consumed only forty-five minutes, following so lengthy and complicated a trial will, on its face, disclose its insufficiency and inaccuracies. It was replete with erroneous, argumentative, discriminatory,

contradictory, incomplete, indefinite, unclarified, meaningless and confused statements. It was therefore preeminently essential for the court to pass upon the requests to charge—most of them containing correctly worded legal propositions taken from recent appellate opinions of the Federal courts, and many of them either not covered at all, or inadequately or incorrectly stated in the charge.

Surely some three hundred requests, coming from counsel *for all parties on trial after a seven months' session,* cannot be considered so burdensome as to justify rejection in *toto.*

Only one-third of these requests were submitted by the appellant Cohen; and of these, about seventy were formal in structure—separately worded requests to cover each of the listed representations (forty-one) and each of the overt acts (twenty-nine) and asking for their withdrawal from the jury *seriatim,* as unproved or outlawed.

The decision below, in this regard, is in conflict with the applicable decisions of the Supreme Court.

Thorwegan v. *King,* 111 U. S. 549, supports the view of appellant.

See also *Egan* v. *U. S.,* 287 F. 958;
cf. *Bruno* v. *U. S.,* 308 U. S. 287, 92.

The Court of Appeals in the opinion below upholds the ruling of the trial judge, but adds:

> "*It is true that in many jurisdictions such requests are taken more seriously than we take them.*" (op. p. 2262)

The question here presented is one of paramount significance in the conduct of criminal trials. Justice may be denied or frustrated by improper application of the rule as to requests to charge. The recognition by the Second Circuit "that in many jurisdictions such requests are

taken more seriously'' suggests a sharp clash of opinion on the weight, value and importance of proper requests to charge.

We submit that the view on this subject, as expressed by the Second Circuit, constitutes a most serious departure from established practice and procedure. The Supreme Court should, in the light of this expression of views by the Court of Appeals, enunciate appropriate rule and policy on this subject, lest this ruling of the Second Circuit serve as a signpost to weaken the whole institution of the charge to the jury—and it is permitted to dwindle away to a mere requirement of a ''colloquial charge''. This would pave the way for a precarious curtailment of the rights of an accused.

Point VIII

Since the Second Circuit Does Not Apply the ''Harmless Error Doctrine'' in Conformity with the Supreme Court Rule in McCandless v. U. S., 298 U. S. 342, and in the 5th, 7th, 8th, 9th and 10th Circuits, the Substantial Prejudicial Errors in This Record, Singly and in the Aggregate, Were Not Accorded Proper Analysis and Appraisal as Demanded by Law

Toward the end of its opinion, the court below asserts:

> ''The foregoing are the only questions which we shall discuss; for the rest, *even were they errors*, we should not because of them reverse convictions so just upon the merits.'' (Italics ours) op. p. 2265.

We respectfully submit that in this record there was an impressive array of predudicial material and legal error of sufficient moment, singly or in the aggregate, to justify a reversal of this verdict.

It is our contention that these were not ''harmless errors'', and that reversal was obligatory according to the

rule as laid down by the Supreme Court in *McCandless* v. *U. S.*, 298 U. S. 342.

The Supreme Court, in that case (after quoting the "harmless error" statute, 28 U. S. C. A., Sec. 391), said:

> "This, as the language plainly shows, does not change the well settled rule that *an erroneous ruling which relates to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial.*" (Emphasis supplied)

The "harmless error statute" was intended, as the Supreme Court points out in *Bruno* v. *U. S.*, 308 U. S. 287, 294, merely

> "• • • to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict."

There has obviously been considerable ferment in the Circuit Court of Appeals for the Second Circuit over the "harmless error" rule. See the dissenting opinion of Jerome Frank, J., in *Keller* v. *Brooklyn Bus Corporation*, 128 F. (2) 510, 514. See also dissenting opinion of Jerome Frank, J., in *U. S.* v. *Liss*,[17] 137 F. (2) 995, 1005, and cases and discussion in the footnotes to said opinion.

L. Hand, J., in *U. S.* v. *Liss*, 137 F. (2) 995, at p. 999, states (for the majority opinion) that:

> "*There is a modern disposition to assume that an error has been harmless.*"

This is an inaccurate statement, and it is one difficult to comprehend, in the light of the very clear and unmistakable

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[17] In *U. S.* v. *Liss*, the opinion was written by L. Hand, J., and concurred in by Swann, J., two of the judges who composed the Bench disposing of the instant appeal (Jerome Frank, J., was not one of the Judges below).

language of the Supreme Court and of five other Circuits,[18] which are quite to the contrary.

Since 1936 by the decision of *McCandless* v. *U. S., supra,* 298 U. S. 342, there can be no doubt as to the position of the Supreme Court on the subject of "harmless error", and that is, unequivocally, that the presumption is that error is prejudicial—and the presumption is not the reverse, as stated, in the opinion below (See *Bruno* v. *U. S.,* 308 U. S. 287).

The cases in the five Circuits, placed in juxtaposition to the view of the Second Circuit that there is "a modern disposition to assume that an error has been harmless", highlights the entire problem, and should, in itself, serve as a warning that the errors in the instant case have not been dealt with in accord with the rule as laid down by the Supreme Court in the *McCandless* case.

As stated in *Worcester* v. *Pure Torpedo Co.* (7th Cir.), 127 F. (2) 945, at p. 947:

> "Moreover, the argument continues, the record discloses the verdict for the defendant was the only verdict that justice could approve, therefore the plaintiffs were not prejudiced and the errors were harmless. 'While this court will not disturb a judgment for an error that did not operate to the substantial injury of the party against whom it was committed, *it is well settled that a reversal will be directed unless it appears, beyond doubt, that the error complained of did not and could not have prejudiced the rights of the party.*' "

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[18] 8th Cir. *Fort Dodge Hotel* v. *Bartelt,* 119 F. (2) 253, 9.
5th Cir. *Farris* v. *Interstate Circuit Inc.,* 116 F. (2) 409, 12.
7th Cir. *Worcester* v. *Pure Torpedo Co.,* 127 F. (2) 945, 7, 8.
9th Cir. *Lynch* v. *Oregon Lumber Co.,* 108 F. (2) 283, 5, 6.
10th Cir. *Little* v. *U. S.,* 73 F. (2) 861, 866.

The first five of these were *civil* causes, and yet judgments were reversed in each instance because, as the Courts indicated, that since the Court cannot be certain that the jury was not affected by the error, it must be presumed as a matter of law that reversible error was committed.

In *Little* v. *United States*, 73 F. (2) 861 (10th Cir.), a criminal conviction was reversed because of what the court admitted might appear to be a harmless error, namely, the court stenographer reading the judge's charge to the jury in the jury room. The opinion states as follows, at p. 866:

> "We conclude that where the entire record affirmatively discloses that an error has not affected the substantial rights of an appellant, it will be disregarded. *But where error occurs which, within the range of a reasonable possibility, may have affected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence their verdict.* So to hold would, as a practical matter, take from a defendant his right to a fair trial. In this case we know nothing of what went on while the stenographer was in the jury room; it is entirely possible that a shorthand character was misinterpreted; emphasis plays an important role in transmission of ideas by word of mouth, and the difficult injunction of the court to avoid any emphasis is no assurance that there was none. What else may have occurred, we do not know. No outsider has any business in the jury room; much harm could result, and that is enough. *The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand.* (Emphasis supplied)

There is ample reason, we submit, not to bypass the various errors, urged by appellant, either those discussed or those which the court below declined to pass on (and waved away with the words "even were they errors, we should not because of them reverse convictions so just upon the merits") (op. p. 2265).

We urge this, especially in the light of the intellectual schism in the Second Circuit, which makes it patent that the "harmless error doctrine" is not viewed in accord

with the rule expressed in the Supreme Court, and five other Circuits.

A serious outgrowth of this position taken by the Second Circuit, and which vitally affects its disposition of criminal appeals, appears to be the process of *rationalization* by the judges therein of their decision to affirm, despite error, to justify upholding a verdict of guilt.

An affirmance by the Second Circuit, even when error is shown, appears to rest on the *assumption* by the judges that if, from the record, the guilt seems clear, and the decision *to them* appears as just on the merits, they may, by agreeing with the jury's decision (albeit the jury was subjected to the influence of error), determine the case by accepting and making as their own the jury's contaminated finding.[19] And that is just what transpired in the instant case, when the court asserts "for the rest, *even were they errors,* we should not because of them reverse convictions so just upon the merits". (op. p. 2265)

May it not very well be that if those "errors" had not been committed, there would have been a different verdict?

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[19] Jerome Frank, J., one of the judges in the Second Circuit, has expressed vigorous views on this subject, in dissenting opinions in both civil and criminal cases (*Keller* v. *Brooklyn Bus Corporation,* 128 F. (2) 510, 514 and *U. S.* v. *Liss,* 137 F. (2) 995, 1001. In the *Liss* case, Judge Frank states, at p. 1001:

> "As I understand the fundamental principle of the jury system, we appellate judges do not sit as a jury. It surely follows that we ought not to sustain a verdict of guilty after an unfair trial merely because, upon reading the printed record, we believe that, had we been the jury, we would have convicted. Any other rule has the result that the presence of the jury will often become a mere formality; for then, if only the jury finds guilt, no matter by what unfair tactics it was persuaded to do so, we judges, in actual fact, decide the case."

Counsel for appellant, upon the basis of these views of Jerome Frank, J., are emboldened to register their protest against the glossing over of error by the court below, on the assumption that the defendants are guilty merely because the jury so found, *despite the fact that the jury so found in a trial where the errors may have clearly influenced their decision.*

And if that is so, can it justly be said that an Appellate Court has the right to sustain a conviction which was achieved by errors (and thus, in law, by unfair means), and in this way take away from the jury their proper fact-finding function. *That fact-finding function must be at a fair trial where there are no substantial errors.*

The procedure of the Second Circuit constitutes merely a substitution, on questions of fact, by the Appellate Court of *its* decision, for the jury's decision, although the sovereign right to find the facts is with the jury. The harmless error doctrine of the Supreme Court, does not permit of appellate fact-finding, as a substitute for jury fact-finding. It demands the very opposite. Once error does appear, then a reversal is mandatory, unless, as the Supreme Court states, "it *affirmatively*[20] appears from the whole records that it was not prejudicial". (*McCandless* v. *U. S.* 298 U. S. 342).

The policy of such a personalized judgment which Appellate Courts are prone to give, when they presume guilt in the record, irrespective of error, inevitably must become a cancerous growth on the body of the criminal law, utterly destroying any vestigial value of jury trials.

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[20] It is noteworthy that the Supreme Court cited *Fillippon* v. *Albion*, 250 U. S. 76, and the word *"affirmatively"* was italicized in the *McCandless* opinion by the Supreme Court.

Point IX

The Court of Appeals Erred in Failing to Hold as Reversible Error, as to Appellant Cohen, the Receipt in Evidence, and the Reading Verbatim to the Jury, of the Legal Opinion of the Circuit Court of Appeals (10th Cir.) in the Wholly Unrelated Mail Fraud Trial Respecting the Conviction Therein of the Co-Defendant, Joel Rosenberg, for a Similar Type of Mail Fraud, and Which Was Reversed on Appeal (Rosenberg v. U. S. (10th Cir.), 120 F. (2) 935)

In a startling move at the trial, the prosecutor offered in evidence, in the course of the cross examination of the co-defendant Joel Rosenberg, the opinion of the 10th Circuit in the case of *Rosenberg* v. *U. S.*, 120 F. (2) 935, which related to said defendant but which in no way involved, (or claimed by the prosecutor to involve) any aspect of the instant prosecution. The prosecutor read this appellate opinion *verbatim* to the jury allegedly to show that though the conviction in that case was reversed, the accused was nonetheless guilty because the decision turned merely on the lack of proof of mailing.

The Court of Appeals erred in justifying the procedure, which is in defiance of the authorities that pronounce such practice as prejudicial and illegal, since thereby the fount of legal instruction to the jury is not restricted, as it must be, to the trial judge. The legal opinion of no other tribunal may be permitted directly or impliedly to affect the jury as to the law of the case.

The justification for this in the instant case, as ruled, in the Court below (op. p. 2267), misses the point entirely, *for it does not even mention the objection as it affects the appellant Cohen.* It is as against Cohen that this extraneous legal opinion constituted most violently prejudicial error and irreparable injury. This was especially

true in view of the fact that the 10th Circuit case involved substantially similar questions of law and fact.

The impact of that opinion, as against the appellant Cohen, could not conceivably be deemed harmless. It was irretrievably prejudicial, and constitutes, we submit, the clearest ground for reversal.

The contention here advanced was the precise point upon which a verdict was reversed in *Brown* v. *U. S.*, 298 F. 428 (cited with approval in *Baush Machine Tool Co.* v. *Aluminum Co. of America*, 79 F. (2) 217, 226.

In *Press Publishing Co.* v. *McDonald* (2nd Cir.) 63 F. 238, 248, it was stated, as ground for reversal, referring to the reading of a legal opinion from another Court,

> "* * * *we cannot say that it may not have influenced the jury in deciding the very question which was submitted to them.*"

This profound error represents such a departure from well established legal procedure, sanctioned by both the District Court and the Circuit Court of Appeals, as to require the invocation of the supervisory power of the Supreme Court.

Point X

The Circuit Court of Appeals Erred in Holding as Non-Reversible Error the Mode of Interrogation, Adopted by the Prosecutor in Cross-Examination of Appellant, by Which He Imputed, by the Affirmations in His Questions, Criminal Convictions to the Employees of the Appellant (Which the Court below Conceded to be "Improper") and the Commendation by the Trial Judge of Said Interrogation, after the Court Had Previously Taken an Antithetical Attitude toward Similarly Phrased Questions, Asked by Appellant's Attorney

The Circuit Court of Appeals in its opinion refers to the conduct of the prosecutor in his cross examination of

the appellant Cohen. It admits that by the form of the questioning, in imputing a record of criminal convictions to the employees of Joseph Cohen, the prosecutor acted improperly, stating:

> "It is quite true that in the case at bar the questions were so put as to show that the prosecutor meant to assert that Cohen's associates have all been in fact convicted; *and that was improper*" (op. p. 2259) (Emphasis supplied).

What the Court below obviously misapprehended was the *added approbation* of the trial judge, and his words of commendation, to this mode of questioning by the prosecutor.

When appellant's counsel vigorously objected, on the ground that statements of fact were being included in the prosecutor's questions without supporting evidence, and it was insisted that the questions should not be considered *as evidence,* the court, referring to the prosecutor, stated:

> "*We are presuming that being a sworn officer of the law, he would speak rather carefully*" (R. 1295) (Emphasis supplied).

The net result of this ruling was that, so far as the minds of the jury were concerned, the Court, in utilizing the language as quoted, put its *imprimatur* upon the factual integrity of the basis of the prosecutor's questions. The vital and prejudicial error, which the court below has recognized to be "improper", was in the prosecutor presenting questions *as evidence,* i. e. making the prosecutor's inquiries appear as *proof.* But, what was more prejudicial was the *added judicial sanction,* as exemplified in the attitude of the court when objection was made thereto.

The error of the trial judge appears, in bold relief, when placed in juxtaposition with the previous ruling of the Court to similarly phrased questions, asked by Cohen's attorney (R. 12943).

It is submitted that in the midst of a mass prosecution, the innuendo which follows from questions thus improperly presented *as evidence* by the prosecutor, coupled with the apparent judicial sanction by the Court as to the prosecutor's conduct—although previously a contrary and stern attitude was adopted towards counsel for the accused for like questioning—must have had a most deadly effect in sealing Cohen's fate.

The vice of such a situation was discussed and was made the basis of reversal in *Berger* v. *U. S.*, 295 U. S. 78, where the Supreme Court, in discussing kindred matter, stated at p. 88:

> "It is as much his (the prosecutor's) duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.
>
> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

That the instant objection is not without real substance appears from the opinion below, where it is stated:

> "The objection purports to be supported by a number of decisions (of which *United States v. Nettl*, 121 Fed. (2) 927 (C. C. A. 3) will serve as an example), holding that a prosecutor may not impeach an accused (the doctrine would also apply to any witness), by so strongly implying in cross examination that he has been convicted that the jury will not credit his denial, but will accept the implication. Whether *United States v. Nettl* went further, and meant to follow the earlier doctrine of the common law (*Wigmore* § 980, sub. 5)

that only the record of the conviction would serve is not entirely plain. In any event the accused at bar altogether misapply the rule" (op. p. 2258).

For the reasons herein asserted, we respectfully submit that the rule was not misapplied by appellant's counsel as the Court of Appeals suggests. On the contrary, we believe that there was misapprehension by the court below of the problem, as it was presented in its totality, namely, the concededly "improper" questioning, when coupled (a) with the trial judge's approval of that impropriety when it stemmed from the prosecutor, and (b) in contrast, his condemnation of like questions when they emanated from appellant's counsel.

There was, accordingly, substantial prejudicial error which was reversible. Failure of the Court of Appeals to appraise that error, as fatal, suggests the need for invoking, with respect thereto, the supervisory power of the Supreme Court.

POINT XI

There was Fundamental Reversible Error by the Trial Court in Excluding the Defendants and Their Counsel, over Their Objection, from the Hearing of Their Motion to Inspect Certain Papers in the Government's Possession and in Violation of the Constitutional Rights of the Accused, Permitting Argument on that Subject by the Prosecutor in Private, Ex Parte

Grave error, it is submitted, was committed by the trial court in excluding the defendants and their lawyers from the argument of an important motion in the course of the trial. It related to the inspection of certain papers which were in the possession of the government.

This point, which has not been discussed at all in the opinion below, presents fundamental questions of consti-

tutional law. It cannot, in justice, be brushed aside as inconsequential or harmless error. The exclusion of the defendants or their counsel from any phase of a criminal trial, if justified, marks the re-establishment of outworn, condemned, and banished criminal procedure—entirely out of keeping with the American system of criminal jurisprudence. (*Snyder* v. *Mass*, 291 U. S. 97, 138 and cases there cited.)

All that the record shows is that, over vigorous objection, a *private hearing* was granted to the prosecutor by the court *for argument of the defendant's motion.* What transpired at that hearing the record does not disclose. It is patent that here was an important motion in the heart of a criminal trial. Yet it was disposed of *in private*, and without the defendants or their counsel being permitted to participate or even to be present, while the prosecutor was allowed argument *ex parte*. The record shows the objections of defense counsel *before* the hearing. It also shows that, after the private hearing, the court ruled in favor of the government "on grounds of public policy" (R. 3482-6).

The very real question of "*public policy*" however was entirely overlooked, not only by the trial judge and the prosecutor, but the Circuit Court of Appeals. They failed to perceive that *all proceedings* in criminal trials must, in line with constitutional requirements, be in the presence of the defendant or his counsel.

Legal questions in the course of a trial may, of course, be argued in the absence of an accused. No case, however, that we have been able to discover in the course of research is authority for the proposition that *both defendant and his counsel* may, over objection, be excluded by the trial court from the argument of a motion in the midst of trial.

We submit that this is a *jurisdictional* question. It may not be treated superficially. It is of equal moment to the

type of error involved in *Little* v. *U. S.* (10th Cir.) 73 F. (2nd) 861, where it was deemed reversible, *on constitutional grounds,* for the stenographer, albeit at the court's direction, to read the trial charge to the jurors in the juryroom.

The questions of constitutional law involved relate to a defendant's right (a) to a public trial; (b) to have, in his defense, the assistance of counsel; (c) to be present, in a felony trial, *either in person, or by his attorney,* throughout every phase of his trial.

It is submitted that if, in connection with a motion in the course of the trial, the Court does exclude the accused or his lawyer, and then proceeds, in *ex parte* proceedings, to hear the prosecutor in private, there is a clear denial of a basic constitutional right which is *jurisdictionally* fatal, and which unequivocally, therefore, constitutes reversible error.

By this ruling of the trial Court, which goes to the root of the whole subject of due process, and which the Circuit Court of Appeals did not discuss but apparently approved (since the contention was advanced below), there has been sanctioned by both Courts such a departure from the accepted and usual course of judicial procedure as to call for an exercise of the Supreme Court's supervision, to the end that the conviction be set aside because of this patent reversible error.

Point XII

The Conviction of Appellant on Count 1, Based Merely on the Uncertain, Self-Contradictory Opinion of a Witness, as to Mailing in the Southern District of New York, (There Being No Envelope) Was Erroneous Because of Inadequate Evidence as a Matter of Law. The Lack of Proof Was Jurisdictionally Fatal Since Proof beyond a Reasonable Doubt as to the Mailing in the District Was the Sine Qua Non for a Verdict of Guilt

Since the mailing is the "gist" of a mail fraud, and is admittedly the very "*corpus delicti*" of the offense (op. p. 2266), proof of the mailing in the Southern District of New York is the *sine qua non* to support the conviction.

The opinion below, in discussing the subject of mailing, states: (op. p. 2254)

> "As to counts 1, 2, 4, 6, 18, 22, 23 and 27 there was testimony that the letters were mailed from New York or *nearby*."[21] (Emphasis supplied)

The opinion continues: (op. p. 2254)

> "The accused do indeed argue that this testimony was so modified upon cross-examination that, coupled with its somewhat uncertain original character, it must be taken as no testimony at all. We have examined the disputed passages in all such cases, and we are satisfied that this contention is without basis, though it would unduly extend this opinion to discuss each case in detail."

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[21] The Circuit Court of Appeals, in employing the word "*nearby*" obviously erred, since there could not be included in that geographical phrase any point outside of the Southern District of New York. Brooklyn and Jersey City, for example, are two points that are *nearby New York*—and are respectively in the Eastern District of New York and in the District of New Jersey. Yet, mailing at such points, although "*nearby*" would obviously be jurisdictionally fatal under the statute.

We must respectfully record our protest to this conclusion of the court below, for we respectfully submit that it cannot be borne out by the record. The fact is that it is demonstrable, almost to a mathematical certainty, that there is no evidence as to the mailing of the Count 1 letter (no envelope) save for the *mere uncertain, self-contradictory opinion* of a witness—the malicious, malevolent and hostile witness Mussman, to boot.

A full analysis of what was testified to on the subject is fully set forth in the Petition and Brief for Rehearing in the court below (pp. 2-16, annexed to the record certified to this Court). It will be observed therefrom, that not only was there the jurisdictional defect of no proof of mailing (except for such obviously worthless *uncertain opinion*), but there is, contrariwise, an impressive display of *documentary* proof, showing the preparation and mailing of that count letter in Boston, Massachusetts, and therefore beyond the jurisdiction of the Southern District of New York.

In its legal aspect, the presentation of this matter to the jury was complicated by (1) the fact that the trial judge referred in several places in his charge to the *State of New York* (R. 12632-3), creating confusion on the subject, and giving the impression that the mailing was not necessarily to be confined to that segment of New York State which was embraced within the Southern District, and (2) the addressee of the letter resided in Garden City, Long Island, *also in the State of New York*, but in the Eastern District.

Since the mailing was the main ingredient of the offense, we submit that here there was no proof beyond a reasonable doubt, first, because of the inadequacy of the self-contradictory opinion, offered as proof on the subject, and second, in view of the confused, unclarified legal instructions relating thereto.

In *U. S.* v. *Baker*, 50 F. (2) 122, the law on this subject was appropriately stated as follows:

> "To avoid such a perversion of the statute, in the guise of passing upon the weight of evidence, it is necessary to insist upon real proof, circumstantial or direct, that, *beyond a reasonable doubt, the mail was used.*"

The Federal Courts should not reach out to grasp for power, on the assumption that there has been a "mailing" even though the scheme and the frauds have been proven beyond a reasonable doubt (*Mackett* v. *U. S.*, 90 F. (2) 462-3, unless, indeed, the proof of the posting is of sufficient character to meet the stringent requirements of the criminal law—for it is the "mailing" that is the Federal ingredient.

In view of this jurisdictional defect, the appellant Cohen, we respectfully submit, has been illegally convicted.

For the rectification of this error, the supervisory powers of the Supreme Court are invoked, for there has been here sanctioned by the trial court, and with the approbation of the Court of Appeals, what appears to be a departure from the accepted and usual course of judicial proceedings.

Point XIII

The Court of Appeals Erred in Failing to Determine as Reversible, the Following Errors of the Trial Court (Which Were Urged as Substantial in the Court below, but Which Were Not Discussed in the Opinion):

(*a*) *In deliberately receiving hearsay, as proper evidence, and ruling that the truthfulness of conversations contained therein, was for the jury to determine;*

(*b*) *In receiving in evidence, as binding on all other defendants, every statement or act of an alleged conspirator, irrespective of whether it was in furtherance*

of the conspiracy, and without independent competent evidence of the connection of the other defendants with the scheme;

(*c*) *In permitting in evidence the declarations of one conspirator to another, as competent evidence to establish the connection of a third person (the appellant Cohen) with the conspiracy;*

(*d*) *In restricting and destroying the value of cross examination of Government Witnesses as to their prior testimony, by requiring (1) reference to the stenographic transcript, and (2) confronting the witness beforehand with the testimony already given; and*

(*e*) *In admitting evidence as to facts occurring subsequent to the date of the indictment, for three years and three months thereafter, and up to January 1, 1942.*

The foregoing and other points set forth and arising out of the assignment of errors, will not be discussed in this brief for *certiorari*. Though they present basic questions constituting, individually and severally, clear ground for reversal, the propositions urged in the previous points are deemed more weighty. Accordingly, analysis and citation of authority are withheld in an effort to avoid undue extension of this brief.

VII

Conclusion

The substantial questions of both law and policy herein presented, evidencing (a) diversity in the Circuits; (b) a clash of legal opinion on fundamental problems in the administration of the criminal law; (c) apparent conflict with applicable decisions of the Supreme Court; and (d) the need for the exercise by the Supreme Court of its

supervisory power, to rectify basic and jurisdictional errors, as a result of departure by the United States District Court and the Second Circuit from established procedure, individually and in the aggregate, merit the deliberative consideration of the Court of last resort.

It is earnestly believed that this extraordinary mass prosecution may serve as a vicious precedent, if not reversed, and have far-reaching effect, in encouraging noxious inroads upon constitutional liberties, and in finally destroying that most cherished right of a freeman, to be secure in his guarantee of a fair and impartial trial. This case presents a unique occasion for finally clarifying and settling the important and basic problems here discussed, but which now are lodged in uncertainty. Of paramount importance, however, is the need for a restatement of the doctrine of immaterial variance, laid down in *Berger* v. *U. S.*, 295 U. S. 78. It is that doctrine which goes to the heart of the entire subject of mass prosecution.

For the Supreme Court to re-examine the *Berger* doctrine and its proper application, will be, we submit, in the public interest, because of the importance of the subject to Federal criminal justice.

The Application for the Writ of Certiorari Should Be Granted for All of the Reasons Asserted, Both in the Petition and in This Supporting Brief

Respectfully submitted,

WALTER BROWER,
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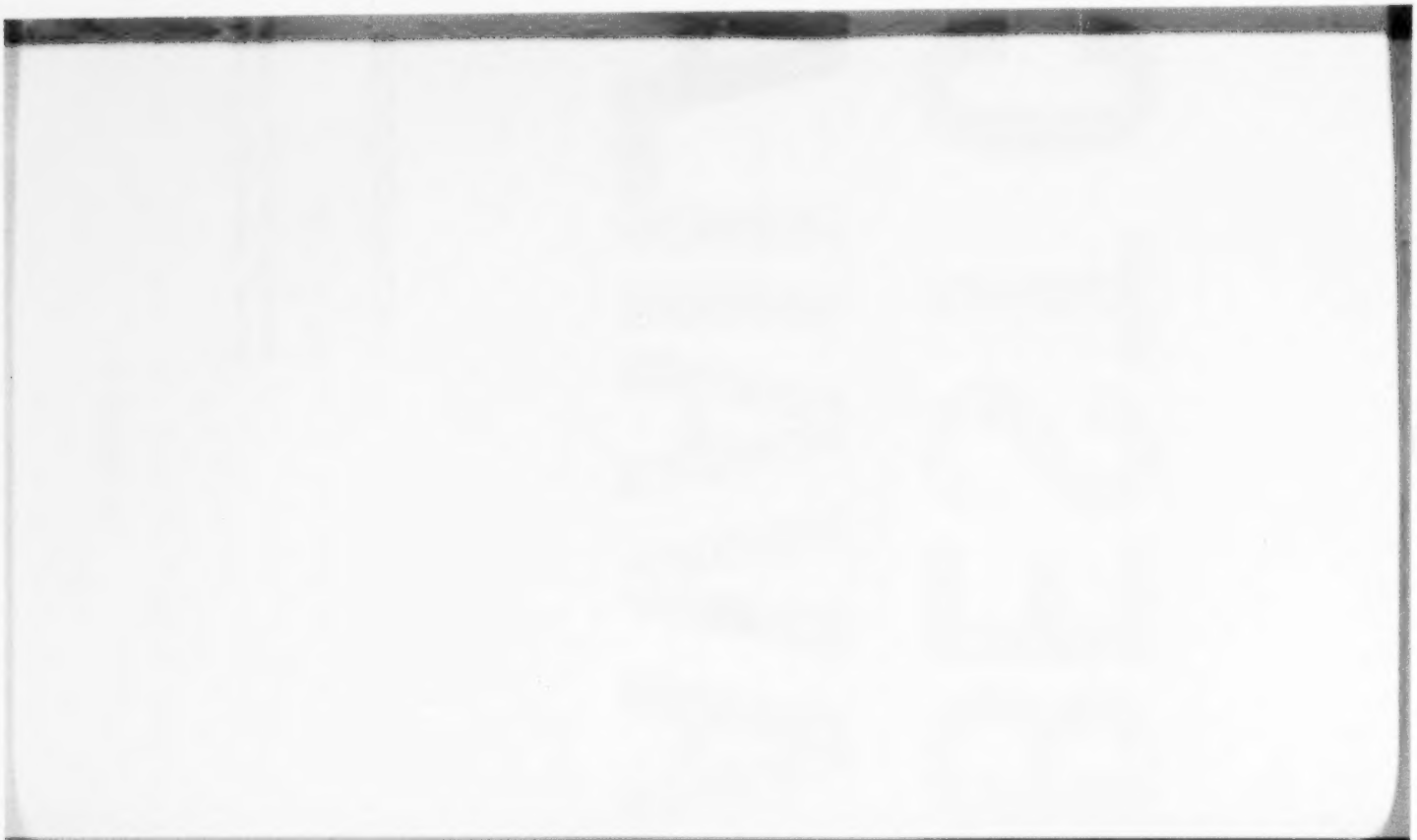
COLEMAN GANGEL,
Of Counsel.



APPENDIX A

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 309-310-326-337—October Term, 1943.

(Argued June 23, 1944 Decided August 8, 1944.)

UNITED STATES,

—*v.*— Appellee,

JOSEPH COHEN, MANDEL RAFFE, BERTRAM M. WACHTEL, JOEL ROSENBERG, and N. E. ROGOFF,

Appellants.

Before:

L. HAND, SWAN and CHASE,

Circuit Judges.

Appeals from a judgment of conviction of the District Court for the Southern District of New York, upon an indictment under §§338 and 88 of Title 18, of the U. S. Code.

WALTER BROWER, for Joseph Cohen.
P. WOLF WINER, for Mandel Raffe.
JAC M. WOLFF, for Bertram M. Wachtel.
SAMUEL W. ALTMAN, for Joel Rosenberg.
PHILIP HANDELMAN, for N. E. Rogoff.
JOHN F. X. MCGOHEY, for the appellee.

L. HAND, *Circuit Judge:*

Five of the twenty-seven defendants, who were brought to trial in this case, appeal. We shall first consider the appeals of three—Cohen, Wachtel and Raffe—since they, perhaps with Fogelson, were the most important actors in a long series of frauds, in some of which all four were confederated, in others of which they apparently operated in two separate groups, as will appear. Rogoff and Rosenberg had subordinate parts in these transactions, and we shall reserve consideration of their appeals until the end. Seventy-five persons were indicted; twenty-eight pleaded guilty before trial; as to nineteen the trial was severed; the indictment was dismissed as to one before trial. Of the above mentioned twenty-seven originally brought to trial on August 5, 1941; verdicts were rendered as to thirteen on March 7 and 8, 1942; thirteen had meanwhile pleaded guilty, and the case had been dismissed by consent as to one. The jury found eleven guilty of the thirteen who remained on March 7 and 8, 1942 and acquitted two; of the eleven convicted six have not appealed, and have presumably already served their sentences, since in no case were these as long as the time that has now elapsed since the verdict. The trial took seven months and the record occupies nearly 12,000 pages. (The stenographer's minutes number almost 16,000 pages.) The indictment was in thirty counts; twenty-nine, for using the mails to defraud—§338, Title 18, U. S. Code—and the last, for conspiracy to commit that crime. The first twenty-nine counts alleged a single "scheme," and differed only in the "count letters": i.e. letters mailed, one in each case in furtherance of the "scheme." The conspiracy count alleged twenty-nine "overt acts," of which the first four occurred more than three years before the indictment was found, September 30, 1938. The "scheme" and the conspiracy were, in general, to sell to

individuals—called "victims"—interests of various sorts in oil bearing lands, and shares of stock in a number of corporations: sometimes oil companies, sometimes not; sometimes companies organized by the defendants, sometimes not. All the "count letters" were alleged to have been posted in the Southern District of New York after September 30, 1935.

We will premise what we say by dealing at once with an error which pervades the arguments of all the accused. They uniformly assume that an appellate court, before affirming a verdict in a criminal case, will demand that the evidence shall be more cogent and persuasive than when reviewing a civil verdict: i.e. that, since the jury must be satisfied of the accused's guilt beyond a reasonable doubt, an appellate court will more straitly scrutinize the evidence necessary to sustain the verdict. There is indeed authority for that position, but it is not the law as we understand it; on the contrary, the certainty required in a criminal case is that of the jury alone, and evidence sufficient to support a civil verdict will support a criminal one. We shall add nothing to our discussion in *Feinberg* v. *United States*, 140 Fed. (2) 592, 594. See also *United States* v. *Andolschek*, 142 Fed. (2) 503, 504 (C. C. A. 2).

The evidence was sufficient to justify the jury in finding that the facts stated in the following narrative were true. In 1929 Raffe was doing business in Boston as a broker; Fogelson joined him as a salesman in the following year, and by 1933 had become important enough to share the profits with him in a land venture in Texas. In that year Cohen and Wachtel were employed in New York in a brokerage house, called Percy Winter & Company; Fogelson left Raffe in 1932 and for a month or so took employment in that company, after which he returned to Boston. In 1933 Raffe was sounding out prospective customers under the assumed name, National Publishers Service, by sending letters to persons whose names he took from a list furnished

him by others. From the character of their responses he determined whom to have his salesmen approach with circulars and by interviews. In 1934 he formed a connection with a man named Pike under the name Joel Pike & Company, and they, together with one Goldie and others continued to do the same kind of business. There was ample evidence to justify a finding that in his business with Fogelson, Pike, Goldie and the others, Raffe was guilty of continuous and manifold frauds in the selling of interests in oil lands and shares of stock. These frauds were of various kinds; sometimes by misrepresenting the property in direct sales to the customers; sometimes by wheedling them out of good property or securities. The victims were generally persons—very frequently women—unused to affairs, and ignorant of the kind of property transferred, and the misrepresentations were of the sort with which courts have become familiar; ordinarily, grossly exaggerated, or baseless, estimates of the prospects of the lands or shares as income producers. Frequently, the path would be paved by visits or letters, falsely purporting to be of persons interested in adjacent properties, whose development was said to be dependent upon the acquisition of the property sold to the victim. At others times the salesman would either call up, or be called up by, some fictitious corporation—"Statistical Department" or the like—to give color to the talk.

Fogelson had come back to Boston before Joel Pike & Company had been organized, and was doing business on his own account under another name. His relations with Raffe had not been severed however, and Raffe told him to give to Pike all "potential" oil lands for which Pike asked. While Cohen and Wachtel were working with Percy Winter & Company they had the names of a number of "prospects" in Massachusetts, and, when Fogelson was on a visit to New York in 1934 they gave him some of these names, and

he supplied them to Pike's company. In that company was a man named Gaines to whom Wachtel supplied still other names directly; and when Wachtel went to Boston, Pike paid him by cheque for this service. As early as 1933 a man named Mussman, the chief witness for the prosecution, began to work for Raffe. He was, on his own admission, an altogether abandoned character, frank to confess a long career of cheating and fraud; seeking to secure lenity by his testimony, and hostile to the accused. The appellants appear to predicate much of their defence upon the unreliability of his testimony, although the case for the prosecution by no means depended wholly upon him. It is scarcely necessary to repeat the conventional answer: the testimony, even of an uncorroborated accomplice who turns state's evidence, will support a conviction. Again and again it has satisfied juries of the guilt of those on whom such wretches turn; from time immemorial it has been the reliance of prosecutors; and juries have probably shown their good sense in accepting it. Mussman was no different from the ordinary type, except possibly in the venom he showed against his former confederates. Raffe set him to work upon a number of "prospects," and the two agreed upon the frauds which should be perpetrated upon them; often in order to throw them off the scent the transactions were completed through fictitious names.

Meanwhile Cohen and Wachtel continued business in New York, either as employees or members of Percy Winter & Company; and we will assume for argument that in its earlier stages the business was not fraudulent, although in the light of later events that seems improbable. At any rate late in 1934 Fogelson saw them, and they agreed that they would turn over promising—"qualified"—New England names to him in return for which he was to give them a third of any profits he might make on the transactions. Beginning then, and going through 1935, and perhaps longer,

this became a practice between them and went into a number of fraudulent transactions. Gaines of Pike & Company introduced Mussman to Wachtel in New York late in 1934, and Wachtel, later, by a telephone message to Raffe's office, brought Mussman to New York, where he introduced him to his partner, Cohen. By the spring of 1935 Mussman was working for, or in cooperation with, both "partners"; and for some part at least of that time, he was also working for, or in cooperation with Raffe. The prosecution put in evidence of more than 200 separate fraudulent transactions with customers; each of these was a "scheme," each was a "conspiracy," and while we do not understand that any of the accused concedes his guilt in any one, it is unnecessary to go into the evidence in detail, so far as concerns the subordinates who actually made the sales. There can be no doubt about their guilt.

The theory of the prosecution was that Raffe, Cohen and Wachtel were all confederates with these subordinates in a single "scheme," in the execution of which each of the twenty-nine transactions in furtherance of which a "count letter" was mailed, was a step. As we shall show later, Raffe was implicated in the transaction in furtherance of which the "count letter" in Count 2 was mailed; Cohen was similarly implicated in Counts 1, 4, 22, 23 and 27; Wachtel, in Counts 1, 5, 6, 7, 18, 20, 23 and 25. They were implicated, both because they had individually something to do with each of those transactions, and because the transactions were all parts of a "scheme," though that "scheme" may not have been single, or comprehended all the transactions. For the moment we address ourselves to the argument that it was a fatal error to join all the transactions into one and to try them together; that the result was the utter confusion of the jury; and that the three were convicted because of a diffused belief in their complicity in a vast fraud. While, as we have just said, there may have been

several separate "schemes," it would have been highly unreasonable to take each transaction as a separate "scheme." Mussman was associated with Raffe in many transactions; in a larger number he was associated with Cohen and Wachtel; in a number Fogelson was also closely associated with Raffe, or was associated with Cohen and Wachtel; in several Goldie was. A jury could certainly find that these were all not several, disconnected and separate, as the accused would have us suppose. They may in fact have found—as we should have—that they were grouped in two general "schemes," or ventures, very alike in structure, and in scope; each one indivisible. To one, which with the prosecution we may call the "scheme" of the Boston Group, Fogelson, Goldie, Mussman and others were parties, along with Raffe. To the other, the "scheme" of the New York Group, Mussman, Coshnear and others were parties along with Cohen and Wachtel. It did not matter that each "scheme" included the sale of shares of stock as well as interests in land; it was enough that the confederates were acting in general concert. Nor did it matter that the personnel of each group varied from time to time; all this was typical in this kind of crime.

And further the jury might have found—as again we should have—that these two "schemes" at times interpenetrated and became one for the time being. This has perhaps already sufficiently appeared, and it may be repetition to note the following. Pike said that Wachtel delivered to Gaines three cards of New England customers for $41, and the cheque was that of Pike & Company of which Raffe was a member. This transaction on its face was not individual to either Gaines or Pike. If it was so in fact, and if Raffe never learned of it or profited by it, he did not prove so; and when people see fit to do business under a firm name, it is to be assumed that transactions done in that name are firm transactions. Again, in the case of the Whittaker land

in Pittsburgh County, Mussman signed the deed at Wachtel's direction, and Wachtel went to a telephone booth saying he was going to call up Joel Pike & Company; the purpose of the call being to feed the deed of Mussman to Whittaker by a conveyance to Mussman. The only possible sources of land in that county were Joel Pike & Company and Fogelson, and Fogelson was almost sure he never dealt in land in that county. If his memory was right, Raffe's firm was therefore providing land for Wachtell to sell to a "qualified" name. Again in the Pettit transaction Mussman sold land to a woman of that name after getting the name from Wachtel. Later Pike made claim for a share of the proceeds on the ground that it had been he who gave the name. Mussman paid him $400 for that reason which came out of Mussman's own share. As before, although this may have been a side venture of Pike's, nothing of the kind appeared, and, as Pike was Raffe's employee on a salary, we need not gratuitously impute to him any disloyalty. Finally, there was evidence of at least a constant interchange between the two "schemes" in the similarity of the devices adopted, both in the use of names like "Mid-Continent Associates," and "L. J. Cronin," and in other ways.

Thus to some extent there was evidence of a concert between Raffe, Cohen and Wachtell in the selling of interests in supposedly oil producing lands; a more or less continuous reciprocal exchange of benefits. We need not find that all the transactions proved were shown to have been parts of that concert; as we have indicated, it is extremely unlikely that they were; the most reasonable interpretation is that, while the two groups worked with a general understanding and with mutual help, each was free to fleece its own customers at its own convenience, and on its own account, so far as the other did not help it. Therefore, even in the strictest sense there was no variance; a single "scheme" was alleged and a single "scheme" was proved,

though by hypothesis it did not include by any means all the transactions proved. The objection, so ardently pressed, comes down therefore to this; that irrelevant evidence was introduced which necessarily confused the jury. There is not the slightest reason to suppose that in fact it did confuse them; on the contrary their verdict gives internal evidence of careful discrimination. But even if they had been confused, it was impossible to avoid it. It was certainly proper to show all the ramifications of the dealings between the two groups; how they trafficked in names with each other; how they adopted the same devices; how the same members shifted back and forth between the two; and how in some cases the same man would apparently be acting for both during the same period. It was not possible to know just where the general "scheme" ended, and where either of the local "schemes" began; and for this reason it was inevitable that most of the evidence admissible in proof of the Boston, or of the New York, "scheme" should go in under the joint "scheme." Neither the prosecution nor the judge could tell in advance whether a given transaction would turn out to be confined to one of the local "schemes," or would fall within the joint "scheme." The judge's course was proper in allowing all the transactions to go before the jury, and then to advise them as he did in several sentences, of which one was as follows: "Where the allegations of the indictment charge a conspiracy and the proof adduced shows that a defendant was engaged in that conspiracy and goes further to show one or more additional conspiracies, the defendant is in no way harmed because of the additional evidence." It is particularly unreasonable for the accused to object that all their misdeeds should be brought to light when they so inextricably confused them themselves: i. e. to complain of that confusion of which they were the authors. It is a strange conception of justice that, if one only tangles one's crimes enough, one

gets an immunity because the result is beyond the powers of a jury to unravel.

But the whole objection is of no importance anyway. At worst it comes to no more than that, instead of being tried upon a single "scheme," the accused were tried upon three "schemes" at the same time. As variance, it would not have mattered if the prosecution had wholly failed to prove any joint "scheme" at all; but had only proved the two local ones. *Berger* v. *United States*, 295 U. S. 78 definitively held that the question in each case was whether any practical prejudice resulted to the accused from such a variance, and that case is now well settled law, as appears from the decisions which have followed it and which we cite in the margin.* Indeed to allow one "scheme" to be alleged and another to be proved, even though the variance consists only of a change in the conspirators, is really to allow the joinder of two conspiracies; and yet that has never been thought material, in spite of the fact that the first conspiracy is an agreement between those who are parties to it, and if some drop out and others come in, a new conspiracy is formed. For this reason, as we pointed out in *United States* v. *Liss*, *supra* (137 Fed. (2) 995), the problem is strictly speaking rather one of joinder under §557 of Title 18, U. S. Code. The case at bar is an apt example of just that; and the question is the same as though all three supposititious "schemes" had been pleaded as separate counts. Certainly they would have been crimes of the same kind, and, for the

* *Blumenthal* v. *United States*, 88 Fed. (2) 522, 531 (C. C. A. 8); *Cooper* v. *United States*, 91 Fed. (2) 195, 198 (C. C. A. 5); *Marx* v. *United States*, 96 Fed. (2) 204, 207 (C. C. A. 9); *Martin* v. *United States*, 100 Fed. (2) 490, 495 (C. C. A. 10); *Kopald-Quinn Co.* v. *United States*, 101 Fed. (2) 628, 633 (C. C. A. 5); *United States* v. *Manton*, 107 Fed. (2) 834, 849 (C. C. A. 2); *United States* v. *Mack*, 112 Fed. (2) 290, 291 (C. C. A. 2); *Chadwick* v. *United States*, 117 Fed. (2) 902, 904 (C. C. A. 5); *United States* v. *Liss*, 137 Fed. (2) 995, 998 (C. C. A. 2); *Pancila* v. *United States*, 140 Fed. (2) 71, 72 (C. C. A. 4).

reasons we have given, their joinder would have certainly been "proper," unless for the fact that the confederates were not the same in all. It is true that the Eighth Circuit in *Coco* v. *United States,* 289 Fed. Rep. 33, held that §557 did not permit the joinder of crimes when the accused were different, but we held the opposite in *United States* v. *Twentieth Century Bus Operators,* 101 Fed. (2) 700, and so has the Seventh Circuit, though by a divided court (*United States* v. *Tuffanelli,* 131 Fed. (2) 890, 893, 894). Therefore, even though the jury convicted Raffe for his share in the Boston "scheme," and Cohen and Wachtel for their share in the New York "scheme" their verdict was as valid in law, as it was eminently sound in morals and good sense.

The foregoing considerations also dispose of the objections based upon the admission of evidence not shown to be connected with the joint "scheme." Since it was proper to try the local "schemes" along with the general one, it was proper to let in evidence relevant only to those "schemes." So too as to declarations of the various confederates. In accordance with the well-settled rule these were all admissible while the "scheme" was in process of realization, provided they were in furtherance of it. Nor would it make any difference that they were after the indictment was found, if the "scheme" had not yet ended; because, while of course the crime must be complete in all its elements before indictment found, there may be evidence thereafter which tends to prove its past existence. Nor again was it wrong to admit evidence of declarations made after Raffe's departure for Arkansas in October, 1936; not indeed because such declarations would be admissible against him, once he had definitively separated himself from the "scheme," but because, as we have already said, that was a defence which it lay upon him to prove, as will appear later.

All the accused (except Rogoff who was only convicted

on the conspiracy count), also complain that there was not enough evidence of the mailing of the "count letters." In the case of counts 5, 7, 19 and 20 the envelope is in evidence, bearing a post-mark showing that it was mailed within the Southern District of New York; and that was clearly enough. Wigmore §151. In the case of count 25 the envelope was received in evidence but has disappeared. As to counts 1, 2, 4, 6, 18, 22, 23 and 27 there was testimony that the letters were mailed from New York or nearby. The accused do indeed argue that this testimony was so modified upon cross-examination that, coupled with its somewhat uncertain orginal character, it must be taken as no testimony at all. We have examined the disputed passages in all such cases, and we are satisfied that this contention is without basis, though it would unduly extend this opinion to discuss each case in detail. We of course agree that in the case of all the first twenty-nine counts the crime under §338 was the mailing of the letter, and that this must therefore be in the district where the indictment is found; but no more persuasive evidence is required upon this than upon any other issue in the case.

It is to be noted moreover that it is not necessary to prove under §338 that the "scheme" itself contemplated the use of the mails. That was indeed required under R. S. §5480 before the amendment of 1909, but the statute was then so modified that it is now enough that during the course of executing the scheme the mails are used. *Farmer* v. *United States*, 223 Fed. Rep. 903, 907 (C. C. A. 2); *Bogy* v. *United States*, 96 Fed. (2) 734, 740, 741 (C. C. A. 6); *Blue* v. *United States*, 138 Fed. (2) 351, 358, 359 (C. C. A. 6). True, the accused must either "place," or "cause to be placed," the "count letter" in the mails; but that does not mean that he must specifically authorize its deposit, it is enough if he knows that in the execution of the scheme letters are likely to be mailed, and if in fact they are mailed. *United*

States v. *Kenofskey*, 243 U. S. 440; *Shea* v. *United States*, 251 Fed. Rep. 440, 447, 448 (C. C. A. 6); *Ader* v. *United States*, 284 Fed. Rep. 13, 25 (C. C. A. 7); *Hart* v. *United States*, 112 Fed. (2) 128, 131 (C. C. A. 5); *Clarke* v. *United States*, 132 Fed. (2) 538, 541 (C. C. A. 9); *Blue* v. *United States*, *supra*, 359 (138 Fed. (2) 351). There can be no question that there was evidence to support the conclusion that all the accused (including on this point Rosenberg and Rogoff), knew perfectly well, not only that the mails might be used in the swindling, but that they were certain to be so used. It is true of course that a letter mailed after the "scheme" was completed will not serve. *Mitchell* v. *United States*, 126 Fed. (2) 550 (C. C. A. 10). But in all cases the letters were either before the victim had been despoiled, in the very act of spoliation, or while he was complaining, and to silence what the confederates feelingly described as his "squawks." The only possible color for the contrary is as to Raffe, who, as we have already twice mentioned, argues that he had already abandoned the "scheme" before the "count letter" on which he was convicted was mailed, September 25, 1936. Raffe did not himself take the stand, and he relies upon the testimony of the prosecution to support his pretensions to have abandoned the "scheme" before that date. Cooper, an associate of his, said that he had settled in Gravette, a small village in Arkansas, "in October, 1936" where he went into the nut business. This was after the mailing of the "count letter"; but, even if it had been before, the testimony would not have been conclusive. The judge rightly told the jury that a confederate, once shown to have been such, had the burden of satisfying them that he had withdrawn from the enterprise. *Hyde* v. *United States*, 225 U. S. 347, 369; *Local 167* v. *United States*, 291 U. S. 293, 298; *United States* v. *Rollnick*, 91 Fed. (2) 911, 918 (C. C. A. 2); *United States* v. *Anderson*, 191 Fed. (2) 325, 331 (C. C. A. 7); *United States* v. *Graham*, 102 Fed.

(2) 436, 444 (C. C. A. 2); *United States* v. *Weiss*, 103 Fed. (2) 348, 354 (C. C. A. 2); *United States* v. *Beck*, 118 Fed. (2) 178, 184, 185 (C. C. A. 7); *United States* v. *Perlstein*, 126 Fed. (2) 789, 798 (C. C. A. 3).

Finally, although it was of course necessary for the prosecution to satisfy the jury as to each of the counts under §338, upon which Raffe, Cohen or Wachtel was convicted, that the transaction, in furtherance of which the "count letter" was mailed, was part of a "scheme" in which the particular accused was implicated, it was not necessary to show that he had had any part in the immediate transaction. It was enough, if the transaction was itself within the general scope of a "scheme" on which all had embarked; those not immediately concerned in any particular fraud, would none the less be liable, so long as that fraud was within the kind on which all had agreed. *United States* v. *Woods*, 66 Fed. (2) 262 (C. C. A. 2); *Robinson* v. *United States*, 94 Fed. (2) 752 (C. C. A. 5); *Bogy* v. *United States*, 96 Fed. (2) 734 (C. C. A. 6); *Spirou* v. *United States*, 24 Fed. (2) 796 (C. C. A. 2); *Landay* v. *United States*, 108 Fed. (2) 698, 703 (C. C. A. 6). Each transaction in the counts under which either Cohen or Wachtel, or both, were convicted was within the scope at least of the New York "scheme," just as the transaction in the second count was within the Boston "scheme." We do not mean that there was not also in each instance, evidence from which the jury might have concluded that each of the three had been directly connected with each particular transaction for which he was convicted; there was, but strictly speaking it was not necessary. For the foregoing reasons we hold that the evidence was sufficient to support the verdict against these three upon all the counts in question. We need add nothing as to count 30 in spite of the fact that a conspiracy differs from a "scheme" in that, being an agreement, the parties must have agreed upon all elements of the crime—including the use of the

mails. *United States* v. *Crimmins*, 123 Fed. (2) 271 (C. C. A. 2). The missing element—intent to use the mails—was supplied, as we have already indicated in holding that the accused "caused" the "count letters" to be mailed, because the evidence justified the jury in finding that all who took part, understood that the mails would be used in the course of the "scheme."

The accused also complain of the conduct of the trial. These objections are varied; we shall not however consider them in detail, but will content ourselves with mentioning those that appear to us to have any serious substance. The chief complaint, often repeated, we have already considered; it is that the evidence was so manifold and complicated that the jury was sure to be confused and lose track of the real issues. We shall add nothing to what we have said except that, if the objection is valid, a prosecutor, faced with such a web, will be forced to single out the most important malefactors and let the small fry escape; for the burden upon the witnesses and upon successive juries of repeated trials would be intolerable. We do not indeed mean that this would excuse the absence of the fundamentals of a fair trial; but these were present. We are dealing only with the chance, and chance alone it is, that a jury may fail to distinguish between the guilty and the innocent; and in deciding the importance of that chance we must not disregard the only available alternative. Moreover, it is impossible to see how the objection, if it were good at all, would be good in the mouths of Raffe, Cohen, or Wachtel, the most important confederates of all.

Next as to the conduct of the judge. It is true that he put little or no restraint upon Mussman; but no harm could have come from that. He was a confessed, unblushing rogue, admittedly concerned with making a case against the accused, partly in the hope of lenity for himself, partly apparently from malice. His outbursts of violent abuse

against them may well have been so unseemly that, in the interests of decorum alone, the judge should have checked him; but it is extremely unlikely that they hurt the accused a particle. The more he showed his spleen, the more he increased the burden of the prosecution, so far as it relied upon his testimony. To have held him in check—which was probably in any event impossible—would probably have deprived the accused of an added reason for asking the jury not to believe him. As for the suggestion that the judge at any time indicated that he was trustworthy, only the extreme of partisanship could find any basis for it in the record.

Cohen took the stand, and upon his cross examination he was asked whether he did not know that several of his associates—one of them a defendant—had been convicted of various crimes all involving deceits. He answered "no" in each case, although the jury may well have understood, and probably did understand, that the persons mentioned had been so convicted. That possibility was however inherent in any attempt to bring out whether Cohen did in fact know that his associates had been so convicted; and that knowledge, if he had it, was altogether relevant, considering the sort of business in which he was engaged. The objection purports to be supported by a number of decisions (of which *United States* v. *Nettl*, 121 Fed. (2) 927 (C. C. A. 3) will serve as an example), holding that a prosecutor may not impeach an accused (the doctrine would also apply to any witness), by so strongly implying in cross examination that he has been convicted that the jury will not credit his denial, but will accept the implication. Whether *United States* v. *Nettl* went further, and meant to follow the earlier doctrine of the common-law (Wigmore §980, sub. 5) that only the record of the conviction would serve is not entirely plain. In any event the accused at bar altogether misapply the rule. The conviction of Cohen's associates would as

such have been wholly incompetent (except indeed in the case of that one who was a defendant and then only to impeach him if he had taken the stand). But it was both competent and relevant to prove that Cohen had employed as subordinates, or been associated with those, whom he knew to have been convicted of such crimes. One way to prove this was to ask it on cross examination; another would have been to call a witness and prove it against him. But the notion that it was improper to ask the question would rule out a large part of cross examination. It is quite true that in the case at bar the questions were so put as to show that the prosecutor meant to assert that Cohen's associates had all been in fact convicted; and that was improper. But it did not impeach Cohen's denial that he knew of the convictions; and, although the upshot may have been to smirch Cohen by leaving in the jury's minds the belief that he had employed, or been associated with, convicts, the question, however limited, would have had that tendency anyway. Any added emphasis, due to repetition, was far too light to count in the scale.

The denial of a bill of particulars in March, 1939, may, or may not, have been an abuse of discretion; it is seldom if ever a reversible error even when it is. *Hindman* v. *United States*, 292 Fed. Rep. 679, 681 (C. C. A. 6). But the objection is frivolous in any event, for the denial could not possibly have prejudiced the accused. The prosecution opened in August 1941, and did not close its case until December; and the notion that any one of them had not had ample opportunity to prepare his defence, or could have been surprised without opportunity to retrieve his position, is too unreasonable for discussion.

Complaint is also made of the refusal of the judge to allow Cohen to examine the testimony of Mussman before the grand jury and of written statements made by him and given to the prosecutor. We have very recently considered

this question in *United States* v. *Krulewitch*, 143 Fed. (2)
, and we need not repeat what we there said. We held that when statements are taken by the prosecution which appear upon inspection by the judge to contradict the testimony of the witness when he is called at the trial, the accused should be allowed to inspect them, since he cannot otherwise impeach the witness. At one stage of the trial the accused did ask the judge to inspect certain supposed statements, in order to see how far they contradicted Mussman. The judge examined the documents and sealed them; they are a part of the record. We too have examined them, and they had no impeaching value whatever.

We come therefore to the judge's charge. We have already considered and dismissed the criticism of that part of it which allowed the jury to convict the several accused upon separate "schemes" or conspiracies. We can find nothing to justify the complaint that the judge bore against the accused and favored the prosecution. He stated the prosecution's charges in detail, and told the jury that those of the accused who had taken the stand, had denied their guilt; he added that the evidence was conflicting and that they must find guilt beyond a reasonable doubt. So far, no one could complain, and indeed the real grievance appears to be that in a case of such great complexity, asserted to have been incurable by any charge of any judge, the judge did not discuss the facts at all. While the accused concede that he was under no absolute duty to do so, they argue that in this particular instance his failure to exert his undoubted powers necessarily resulted in a miscarriage of justice. Granting for argument, they say, that their rights were not in any event hopelessly compromised by such a trial, nothing less than a detailed discussion could have saved them. Such reasoning may seem plausible, but in application it falls apart. If the judge had once embarked upon a consideration of the transactions in detail,

he would have committed himself to a discussion of them all; otherwise he would surely have laid himself open to the charge of undue emphasis. On the other hand, to undertake such a Herculean task would not have helped the jury, but merely have added to the weight of verbiage that they had already been called upon to bear during twelve days of summing up by counsel. Moreover, it would not have been humanly possible to do so without either making serious slips, or of seeming to favor one side or the other. It is possible that there may be judges who could safely do so—Lord Cockburn summed up the *Tichbourne* Case for a week or more—but it is beyond the powers of all but the merest few, assuming that there are any who can do it. And, whatever be the rule across the water, in this country not only has the exercise of the power never been obligatory, but the power itself has been somewhat suspect. It is strange to hear an accused complaining of such a failure; we may be assured that, if the power had been used, the complaints would have been louder, and almost certainly better grounded.

The accused also complain of the judge's refusal to consider and charge any of the 366 requests which collectively they submitted to him. We have again and again discountenanced requests in such numbers. We do not of course mean that the parties to any trial, civil or criminal, should not be allowed to suggest to the judge what they believe to be their rights, privileges, or immunities. No doubt, in disregarding all requests, a judge takes his chances that he may have forgotten something substantial. But in this case he had not done so: if he had given the instructions in ipsissimis verbis, he would have merely added to whatever was that confusion against which the accused so vociferously protest. Whatever enlightenment a jury gets, ordinarily it gets from the colloquial charge, and from any later colloquial additions to it. It is exceedingly doubtful whether

a succession of abstract propositions of law, pronounced staccato, has any effect but to give them a dazed sense of being called upon to apply some esoteric mental processes, beyond the scope of their daily experience which should be their reliance. It is true that in many jurisdictions such requests are taken more seriously than we take them; we can only say in answer, that to do so appears to us to be part of that attitude towards the institution, which on the one hand affects to suppose that laymen are capable of making effective use of any number of abstract legal propositions, couched in unfamiliar terms, while on the other hand, they are subject to whims, caprices and passions which make the slightest alien intrusion a ground for upsetting all that they may have done. We do not share that attitude.

To what we have said there is indeed one exception which raises the only really important doubt in the whole trial. It touches the statute of limitations, and is limited to count thirty: the conspiracy count. As we have said, the draughtsman of the indictment quite unnecessarily multiplied the overt acts by alleging twenty-nine in all, of which the first four were laid before September 30, 1935: i.e. before the period of limitation. The accused argue that, since the judge did not take these four acts away from the jury, it is possible that the only acts they found were these, or some of them; and that, if so, the statute was a bar, because it begins to run from the last overt act found. This argument is formally good, if the law is good, and there is undoubtedly authority for the proposition that the period does so run. Even so, as applied to the case at bar, the possibility was so remote as to have the least possible practical importance, for the first four overt acts were all talks in New York between Mussman, Cohen and Wachtel, and there were twelve other such overt acts: i.e. talks or meetings between Mussman and either Cohen or Wachtel, or

some of the others, all laid within the period of limitation. Besides these, there were ten or more, which consisted of mailing letters or other documentary acts, which were also in season. It is in the highest degree unlikely that the jury actually selected one or more of the earlier talks, and refused to find any of the other talks or the mailing of any of the letters. Nevertheless, against that purely theoretical chance, it may be necessary to make some conclusion on the point of law involved.

It must be owned that there is a body of authority, as we have said, that the statute of limitations runs from the last overt act which has been proved. In addition to early decisions in the district and circuit courts, the Eighth Circuit has so declared in *Ware* v. *United States*, 154 Fed. Rep. 577, and in *Culp* v. *United States*, 131 Fed. (2) 93, 100; so has the Ninth in *Jones* v. *United States*, 162 Fed. Rep. 417, 425 and in *Hedderly* v. *United States*, 193 Fed. Rep. 561, 569; and so has the Court of Appeals of the District in *Lorenz* v. *United States*, 24 App. D. C. 337, 387. Indeed, in *Brown* v. *Elliott*, 225 U. S. 392, 401, a passage to that purport from *Lonabaugh* v. *United States*, 179 Fed. Rep. 476, was quoted with apparent approval. However, all these decisions were upon records where there had been an overt act within the statutory period, and where it was therefore not necessary to decide the point. The only decisions that we have found in appellate courts, which demanded a decision on the point are two in the Eighth Circuit: *Lonabaugh* v. *United States* which we have just cited, and *McWhorter* v. *United States*, 299 Fed. Rep. 780, which curiously enough, did not cite *Lonabaugh* v. *United States*. On the other hand we cannot read *Kissel* v. *United States*, 218 U. S. 601, in any other sense than as contrary to such a notion. It came up upon demurrer to a plea in bar, based upon the statute of limitations, in which the accused had alleged that all the overt acts pleaded, which had hap-

pened within three years after indictment found, had been done without "his participation, consent or knowledge," (p. 606). Nevertheless, the Supreme Court reversed a judgment sustaining the plea, reasoning that if the conspirators continue "efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success," (p. 608). We do not forget that the indictment there involved was under the Sherman Act in which no overt act is necessary; but it seems to us incredible that this should make any difference: that is, that a conspiracy, which is not a crime until some step is taken in performance of it, should be held to end earlier than a conspiracy which is a crime ab initio. It has been said over and over again that the conspiracy, not the overt act, is the "gist" of the crime. *United States* v. *Hirsch*, 100 U. S. 33, 34; *United States* v. *Britton*, 108 U. S. 199, 204; *Bannon* v. *United States*, 156 U. S. 464, 468; *Joplin Mercantile Co.* v. *United States*, 236 U. S. 531, 535; *Pierce* v. *United States*, 252 U. S. 239, 244; *Braverman* v. *United States*, 317 U. S. 49, 53. It is true that in *Hyde* v. *United States*, 225 U. S. 347, 357, a majority of the court held that the conspirators take part in the conspiracy in every district in which any overt act occurs; but that does not fuse the conspiracy with the act, but rather the act with the conspiracy—carrying the conspiracy into every part of its performance, but in no sense limiting it to its performance. In principle, surely the doctrine cannot stand up; a condition interposed to prevent the conspiracy from becoming a crime until the parties have done something to effectuate it, cannot in reason be said to end as soon as it begins, and to require revival by some later step. De facto that is absurd; de jure, it identifies the conspiracy with the act. Finally, the practical consequences of such a doctrine would be most serious: conspirators would secure immunity if they agreed to seek cover, and awaited a propitious moment to resume their activities. For the foregoing reasons we do

not find it necessary to consider whether the theoretical error which the record would present, if the law were as the accused argue, is in any case real enough to be ground for a reversal of the convictions on the conspiracy count.

The foregoing are the only questions which we shall discuss: for the rest, even were they errors, we should not because of them reverse convictions so just upon the merits. Raffe, Cohen and Wachtel were the chiefs of a wide-spread skein of mean and callous fraud: the plunder of simple people, often of modest means, by practicing upon their inexperience by the lure of speculative profits. In spite of the recent elaborate legislative attempts to protect such folk, they remain, and probably always will remain, apt gulls for this kind of bait, enticingly strewn before them by skillful knaves. In spite of the length of the trial and the complication it involved, all the essentials of justice were accorded them. None of their multitudinous objections go to the heart of the matter; and while, like everyone else on trial for crime, they were entitled to whatever the established procedure gave, we have no disposition to stretch any points in their favor. In spite of the fact that their sentences were cumulative, we do not incline to intervene. Their convictions will be affirmed, except that in the case of Raffe, the fine must be reduced from $2500 to $1000, the maximum allowed under §338 of Title 18, U. S. Code.

As to Joel Rosenberg, although there is ample evidence to connect him with the New York "scheme," his part in it, so far as appeared, was limited and occasional; he was not confederate to the venture as a whole in the sense that Cohen, Wachtel, Mussman and Coshnear were. For this reason the prosecution cannot properly say that the Fennikoh, or the McDonald, transaction fell within the scope of any general "scheme" to which Joel Rosenberg had affiliated himself; and it was obliged to connect him specifically with any counts on which he was to be convicted. It

so happens that there was not enough evidence to connect him with the Fennikoh count at all; and that the prosecution did not prove that he had become a party to the McDonald transaction before December 7, 1936, the date of the mailing of the "count letter." Our reasons for these conclusions are as follows: As to the Fennikoh transaction, Joel Rosenberg was indeed present in a car and waited outside, while Mussman went into Fennikoh's house at Livingston Manor, and tried to appease him. Wachtel had given Fennikoh's name to Mussman, and so had another of the accused, Edward Rosenberg; and later Mussman divided his gains with Wachtel, Coshnear and either this Edward Rosenberg, or with Joel. The case against Joel depends upon whether he was the Rosenberg with whom Mussman did divide the loot, for Joel's mere presence in the car while Mussman went into Fennikoh's house, was not enough to implicate him. It is true that, when Mussman first spoke of the "split," as he called it, he named "Joe," but almost immediately he changed this to Edward, and to that he adhered on his cross examination. There is no real doubt that his first mention of Joel was not intentional, and the case against him on count 7 was not therefore proved. Indeed, Mussman would scarcely have "split" with Joel to whom he owed nothing, but rather with Edward, who shared with Wachtel in setting him upon Fennikoh. As to count 19, while there was ample testimony to support a verdict that Joel Rosenberg was party to the fraud upon the McDonalds, Mussman was altogether vague as to the time when Joel joined him and Goldie in the transaction, and there was no other testimony to fix it. The "count letter" being dated December 7, 1936, and the posting of the letter being under all the authorities the corpus delicti, there was no evidence to support the verdict. *Olsen* v. *United States*, 287 Fed. Rep. 85 (C. C. A. 2); *Armstrong* v. *United States*, 65 Fed. (2) 853, 857 (C. C. A. 10). For these reasons the con-

viction of Joel Rosenberg on counts 7 and 19 must be reversed.

On the other hand his conviction on the conspiracy count should be affirmed. As we have just said, there was testimony directly connecting him with the McDonald frauds, and his argument that the jury should not have believed it is unsound, as we have seen. Nor were there any errors which demand reversal. He complains of the admission against him of the opinion of the Tenth Circuit in *Rosenberg* v. *United States*, 120 Fed. (2) 935, in which it reversed a conviction against him in another case, this reversal resulting in the dismissal of the indictment. He could not have more deliberately invited the admission of this opinion than by volunteering the statement which he made upon the stand that, although he had been convicted, the judgment was reversed and the indictment dismissed. His purpose was obviously to give the jury to understand that he was cleared of any part in the fraud that was there involved, and that was a totally false purpose. He was not cleared at all; the indictment was dismissed only because the prosecution failed to prove the mailing of the "count letter," as the prosecution has failed here. He also complains of the refusal to let him inspect the minutes of the testimony of Ellen McDonald, who had died before the trial. On what theory he should have been allowed to see the testimony of a witness who could not be called, and the record of whose testimony would have been hearsay, we are not advised.

It is indeed true that there is hardship, and perhaps some danger, in trying a man, shown to have had so little share in a conspiracy with those, who like Raffe, Cohen and Wachtel were its directing heads. There was little or no reason to suppose that Joel Rosenberg had had any dealings at all with the Boston group, for example, or with many of the transactions of the New York group. Nevertheless,

what we have already said about joinder of the accused, applies to the smaller participants as well as to the more important. That they may be convicted merely because of their association is possible, though it is certainly no more than a speculation to assume so; but there is no practical alternative except, as we have said, to give them immunity. The chance that a joint trial will not as to them be a fair trial, has to be balanced against the fact that it is a joint trial or none. Indeed, if we were to accept the argument, there would really be an end of trials for jointly conceived, or jointly executed, crimes, except in cases of the simplest character. For these reasons the conviction of Joel Rosenberg upon count 30 will be affirmed.

We need add nothing as to Rogoff; the evidence amply implicated him in the conspiracy; indeed, his argument, like Rosenberg's, comes to little more than that the jury should not have believed the witnesses. What we have just said about trying Rosenberg with the others, also applies equally to him. His conviction will be affirmed.

Conviction of Raffe on count two affirmed, except that the fine imposed is reduced to $1000; conviction on count thirty affirmed.

Convictions of Cohen on counts one, four, twenty-two, twenty-three, twenty-seven and thirty affirmed.

Convictions of Wachtel on counts one, five, six, seven, eighteen, twenty, twenty-two, twenty-three, twenty-five and thirty affirmed.

Convictions of Rosenberg on counts seven and nineteen, reversed; conviction on count thirty affirmed.

Conviction of Rogoff on count thirty affirmed.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 669

JOSEPH COHEN, ET AL.,

Petitioners,

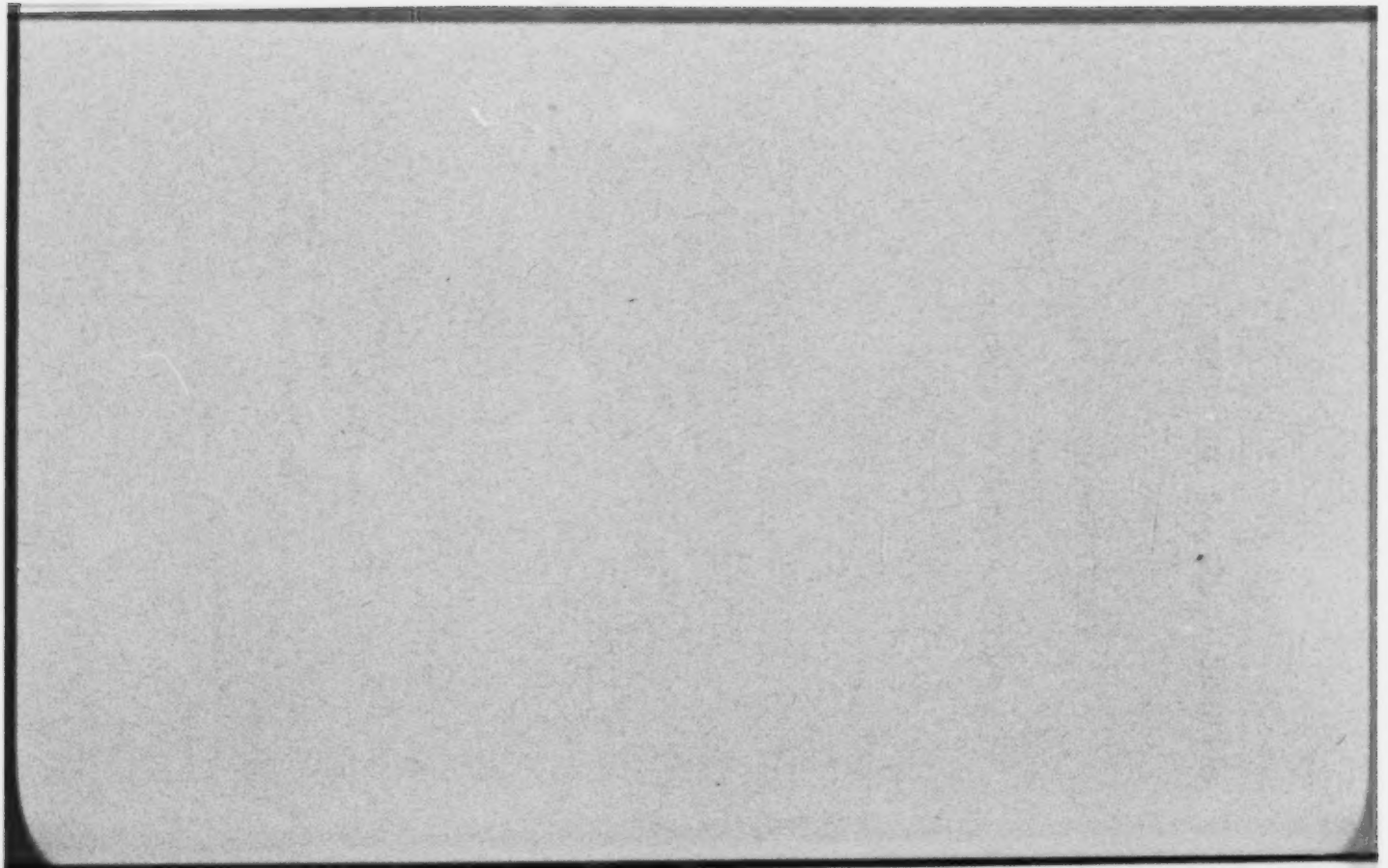
vs.

THE UNITED STATES OF AMERICA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MOTION FOR LEAVE TO PROCEED ON TYPEWRITTEN RECORD

WALTER BROWER,
Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES

JOSEPH COHEN, ET AL.,

against *Petitioners,*

UNITED STATES OF AMERICA

SIR:

NOTICE is hereby given that petitioner JOSEPH COHEN, on the ground of inability to pay the cost of printing respectfully moves the Supreme Court of the United States for leave to file, for the purposes of his petition for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit, and appeal, the typewritten copy of the record now on file with the Clerk of this Court, and the original exhibits, all in lieu of printed copies thereof, as required by the Rules of this Court.

FURTHER NOTICE is hereby given that this motion has been filed simultaneously with the petition for a writ of certiorari in the above matter.

Dated, New York City, November 1st, 1944.

Yours, etc.,

WALTER BROWER,
Attorney for Joseph Cohen,
165 Broadway,
New York City, New York.

To HON. CHARLES FAHY,
Solicitor General.

SUPREME COURT OF THE UNITED STATES

JOSEPH COHEN, ET AL.,

against *Petitioners,*

UNITED STATES OF AMERICA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petition of Joseph Cohen respectfully shows:

1. I am the petitioner herein and in the proceedings for a writ of certiorari in connection with which this application is made.

2. This is an application for leave to file with this Court for the purposes of the petition for a writ of certiorari and the appeal, in the event such petition is granted, a typewritten copy of the record and the original exhibits in lieu of printed copies thereof as required by the Rules of this Court.

3. Application for this relief is necessary because of the unusual size of the record, the cost of printing the same and the almost prohibitive expense involved in the trial and resulting judgment of which review is sought.

4. I was tried in the District Court of the Southern District of New York on an indictment charging me and seventy-four other defendants with violations of Title

18, U. S. C. Sections 338 and 88. There were twenty-nine substantive mail fraud counts and one count charging conspiracy to use the mails.

5. After a trial lasting over seven months (from August 4th, 1941, to March 10th, 1942) I was found guilty on five substantive counts and the conspiracy count. I was sentenced to a total term of seven years imprisonment and a fine of $5,000.00.

The judgment of conviction was affirmed by the United States Circuit Court of Appeals for the Second Circuit. A petition for a writ of certiorari to the Circuit Court of Appeals is now being prepared and will be docketed with the Clerk of this Court simultaneously with the filing of this application.

For the merits of my appeal and the legal propositions there involved, I respectfully refer to the aforementioned petition for a writ of certiorari, which for that purpose I incorporate herein by reference with the same effect as though herein set forth in full.

6. During this seven months trial, a total of sixteen thousand pages of testimony were transcribed, which were reduced for the purpose of certification to the United States Circuit Court of Appeals for the Second Circuit to twelve thousand pages by stipulation and Court order. There were some four thousand exhibits received in evidence, some of which consist of great batches of documents and books having several hundred pages. Illustrative of the extent of the stenographic problem which was involved is the fact that the one volume which lists the exhibits was typewritten at a cost of $300.00.

7. On appeal to the Circuit Court of Appeals for the Second Circuit, that Court by order dispensed with the

printing of the record and briefs. Notwithstanding permission to file the typewritten record the preparation of that typewritten record cost about $20,000.00, of which sum I paid $8,000.00.

8. The certified record, exclusive of exhibits, filed with the Clerk of this Court consists of 13,332 pages.

9. A further reduction in the size of the record for the purpose of printing is not possible without the certain danger of prejudicing my appeal to this Court. I am so advised by my attorney and verily believe. Among the reasons for this is that although there was a single conspiracy alleged in the indictment, proof was offered and received of over two hundred separate and unconnected and unrelated conspiracies with small groupings of defendants, none more than five, most less than three. These two hundred separate and unrelated conspiracies involved five hundred separate transactions. The evidence of all of these two hundred separate conspiracies and five hundred separate transactions was ruled by the trial judge to be binding on all the defendants including petitioner.

10. I am informed that printing of the record would cost approximately $37,000.00.

11. The expense of the trial of this matter, the appeal to the United States Circuit Court of Appeals, the publicity and resulting injury to my business reputation and earning capacity because of this indictment and conviction have brought me to a point where I have not the money, resources or earning capacity to pay for printing of the record or even additional typewritten copies thereof. Consequently, a denial of this application would be tantamount for me to a denial of a review of my case by this Court.

12. I have already expended and obligated myself to pay by reason of the indictment and conviction here, the sum of $52,700.00. The items comprising this sum are stenographic charges $8,000.00, investigations and incidentals in connection with preparation for this long trial $2250.00, trial and appellate counsel fees, including fees paid to attorneys for services before the Securities and Exchange Commission as a result of this case $38,450.00. Because of the conviction and indictment herein an unfounded action was brought against me for $25,000.00, defense of which was not feasible after the conviction. I was therefore compelled to settle and pay for a disposition of this action the sum of $4,000.00.

13. I am legally engaged in the securities business buying and selling securities as a registered dealer in the State of New York. By reason of this conviction I am required by law to restrict my business to intrastate transactions. This factor in addition to the adverse publicity involved by this action and the expense involved has reduced my financial resources to less than $5,000.00. My earnings do not exceed the rate of $5,000.00 per annum. In order to cover the heavy expenses involved in this proceeding, it has been necessary for me to augment my income by the earnings of my wife, who has worked until recently as a saleslady for the R. H. Macy Department Store in New York City at $20.00 per week. Her employment terminated recently because of ill health. I have borrowed on my life insurance policies the entire cash equity therein available for loan purposes.

To my deep regret, in addition to this, I have had to call on a monthly allotment of $100.00 which I receive from the United States Navy through my son who is presently on active duty in the Pacific area of operations as a United States Naval Lieutenant (j. g.).

All of this I have been required to and did do in order to cover the mounting costs of this action in addition to my modest living expenses.

14. I am seeking a review of the judgment on substantial legal questions. I am advised by my attorney and verily believe that substantial errors of law have been committed in the course of my trial which have not been corrected by the Circuit Court of Appeals. A denial of this application would result in closing the door to me to such redress as after review this Court might decree.

I most respectfully pray that I may not be denied this relief by reason of my financial inability to pay this unusual and enormous printing bill.

15. Wherefore, I respectfully ask for leave to file with this Court for the purposes of the petition for a writ of certiorari and the appeal, if the writ be granted, the typewritten record together with the original exhibits in lieu of printed copies thereof as required by the Rules of this Court.

16. That no previous application for the relief here sought has been made.

Dated, New York, November 1st, 1944.

JOSEPH COHEN.

STATE OF NEW YORK,
City of New York,
County of New York, ss:

JOSEPH COHEN, above named, being duly sworn, deposes and says that he is the petitioner in the within action, that he has read and knows the contents of the foregoing petition, that the same is true to his own knowledge,

except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes them to be true.

JOSEPH COHEN.

Sworn to before me this 1st day of November, 1944.

FRANK FINBERG,
Notary Public, Kings County.

Kings Co. Clk's No. 226 Reg. No. 284-F-6.
N. Y. Co. Clk's No. 666 Reg. No. 418-F-6.
Commission Expires March 30, 1946.

SUPREME COURT OF THE UNITED STATES

JOSEPH COHEN, ET AL.,

Petitioners,

against

UNITED STATES OF AMERICA

STATE OF NEW YORK,
City of New York,
County of New York, ss:

WALTER BROWER, being duly sworn, deposes and says:

That he is counsel for the petitioner, JOSEPH COHEN.

That a petition for writ of certiorari in behalf of JOSEPH COHEN is presently being prepared to be docketed with the Clerk of this Court on or before December 5th, 1944, simultaneously with the filing of the annexed petition.

The petitioner JOSEPH COHEN has substantial and meritorious grounds as the basis for the application for the writ of certiorari and in the considered opinion of your deponent there are reasons for the granting of the petition for writ of certiorari within the purview of Rule 38 (5) (b) of this Court.

For the specific questions of law and reasons for granting of the petition for writ of certiorari, deponent respectfully refers to the said petition for writ of certiorari and

incorporates the same herein by reference with the same force and effect as though here set forth in full.

WALTER BROWER.

Sworn to before me this 1st day of November, 1944.

FRANK FINBERG.

Notary Public, Kings County.

Kings Co. Clk's No. 226 Reg. No. 284-F-6.
N. Y. Co. Clk's No. 666 Reg. No. 418-F-6.
Commission Expires March 30, 1946.

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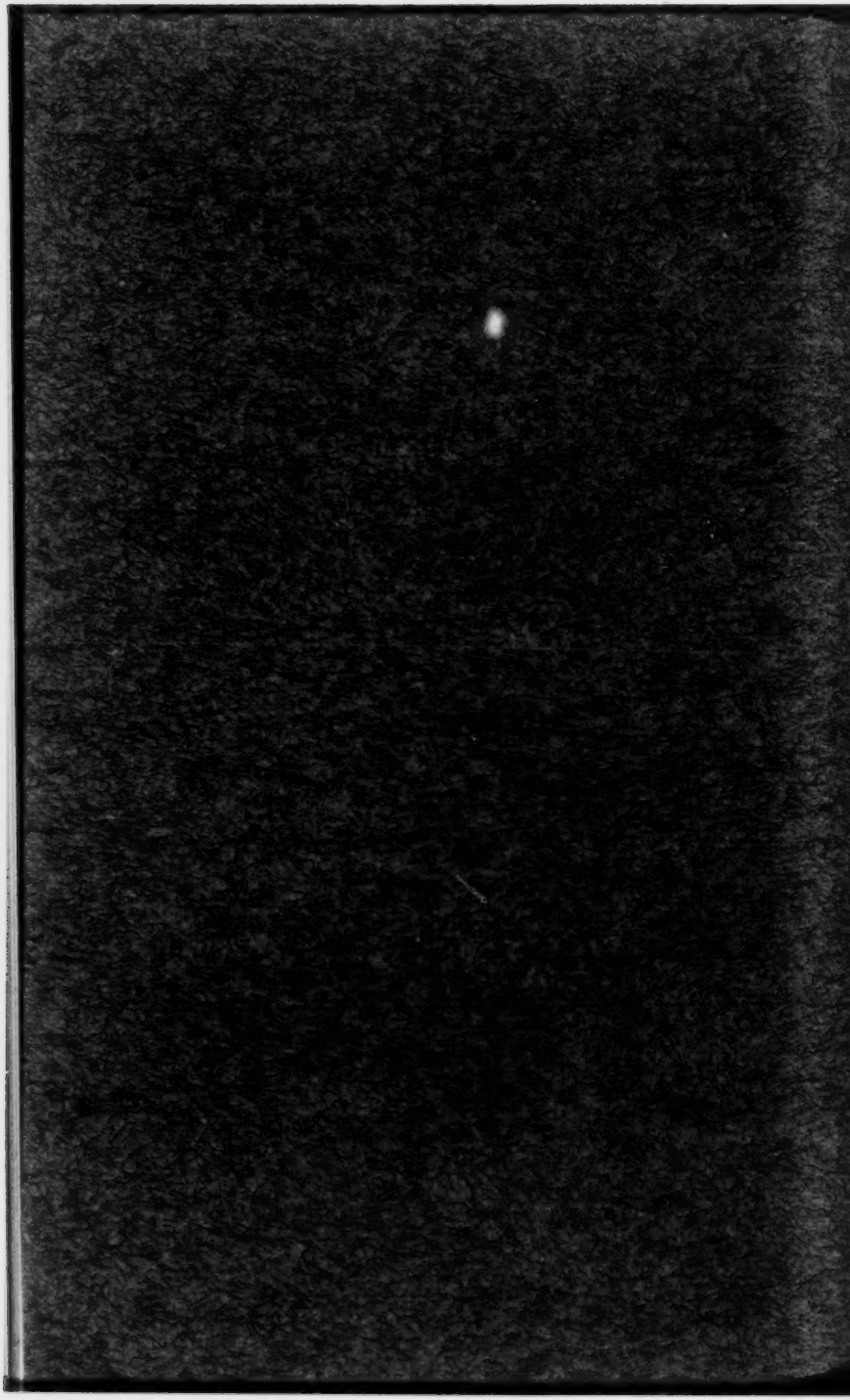

INDEX

CITATIONS

624922—45——1

In the Supreme Court of the United States

OCTOBER TERM, 1944

Nos. 669, 670, 671, 682, and 683

JOSEPH COHEN, MANDEL RAFFE, N. E. ROGOFF, JOEL ROSENBERG AND BERTRAM WACHTEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported at 145 F. (2d) 82.

JURISDICTION

The judgment of the circuit court of appeals was entered October 18, 1944. The petitions were filed on or before November 15, 1944. The jurisdiction of this Court is invoked under Section

240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether petitioners were improperly subjected to a lengthy trial of numerous schemes to defraud rather than of one scheme or conspiracy as charged in the indictment.

2. Whether the trial judge committed reversible error in failing to withdraw from the jury's consideration those 5 of 29 overt acts set forth in the conspiracy count which were alleged to have occurred more than three years prior to the returning of the indictment.

3. In addition the following questions are raised by one or more of the petitioners:

a. Whether the circuit court of appeals applied a proper standard for appellate review of the sufficiency of the evidence.

b. Whether the evidence is sufficient to establish petitioner Raffe's participation in a conspiracy within the jurisdiction of the district court during the period of limitations.

c. Whether the evidence is sufficient to establish the mailing within the jurisdiction of the district court of the letters on which counts 1 and 2 were based.

d. Whether the district judge failed to curb the Government's accomplice witness Mussman sufficiently.

e. Whether the reading of a reported opinion, on cross-examination, showing that the reversal of petitioner Rosenberg's prior conviction for mail fraud was based not on the absence of a scheme to defraud but on the lack of proof of mailing prejudiced the other defendants.

f. Whether it was prejudicial misconduct for the prosecutor to question petitioner Cohen concerning his knowledge that persons employed by him had previously been convicted of crimes involving deceit.

g. Whether petitioners were deprived of their constitutional rights by reason of the fact that the judge privately examined statements made by a government witness to government officers in order to ascertain whether such statements should be made available to defendants.

h. Whether the trial court abused its discretion by denying petitioner Rosenberg's motion to examine the transcript of the testimony before the grand jury of a witness who had died before the trial.

STATUTES INVOLVED

Section 37 of the Criminal Code, the general conspiracy statute (18 U. S. C. 88), provides:

> If two or more persons conspire either to commit any offense against the United

> States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 215 of the Criminal Code, the mail fraud statute (18 U. S. C. 338), provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, pack-

age, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

STATEMENT

An indictment in 30 counts charging use of the mails in execution of a scheme to defraud and conspiracy so to use the mails was returned against 75 defendants in the District Court for the Southern District of New York.[1] The scheme charged was, in essence, one to defraud named victims and persons to the grand jury unknown by means of various fraudulent representations designed to induce them to purchase interests of various kinds in lands represented as oil bearing, or shares of stock in various oil and other companies. Twenty-eight defendants pleaded guilty prior to trial, the case was severed as to 19, and the indictment was dismissed as to one prior to trial. Thirteen defendants pleaded guilty and the indictment was dismissed as to one during

[1] The indictment appears at pp. 2–68 of the record filed on behalf of petitioner Rogoff. All record references in this brief, unless otherwise noted, refer to the complete transcript of the stenographer's minutes of the trial filed in the circuit court of appeals by the United States Attorney with permission of that court. All petitioners have proceeded on typewritten records of varying lengths representing abridgements of the original transcript, none of which have been served upon the Government. We are lodging with the Clerk of this Court the transcript filed by the United States Attorney in the circuit court of appeals.

trial. Of the remaining 13 two were acquitted and 11 convicted by the jury on various counts. The 5 petitioners were convicted and sentenced as follows:

Bertram Wachtel: Convicted on Counts 1, 5, 6, 7, 18, 20, 22, 23, 25, and 30. Sentenced to 5 years on Count 1; 2 years on Count 30, the conspiracy count, to run consecutively; and fined $5,000. Sentence suspended on Counts 5, 6, 7, 18, 20, 22, 23, 25 and defendant placed on three years' probation (R. 15763).

Joseph Cohen: Convicted on Counts 1, 4, 22, 23, 27, and 30. Sentenced to 5 years on Count 1; 2 years on Count 30, to run consecutively; and fined $5,000. Sentence suspended on Counts 4, 22, 23, 27 and defendant placed on three years' probation (R. 15762, 15789, 15790).

Joel Rosenberg: Convicted on Counts 7, 19 and 30. Sentenced to 5 years and $2,000 fine on Count 7. Sentence suspended on Counts 19 and 30 and defendant placed on three years' probation (R. 15741).

Mandel Raffe: Convicted on Counts 2 and 30. Sentenced to 5 years and $2,500 fine on Count 2. Sentence suspended on Count 30 and defendant placed on three years' probation (R. 15763, 15798).

N. E. Rogoff: Convicted on Count 30. Sentenced to 18 month and $500 fine (R. 15740).

The Circuit Court of Appeals for the Second Circuit affirmed the judgments except that it re-

versed the convictions of petitioner Rosenberg on the two substantive counts, leaving merely his conviction on the conspiracy count, on which he was placed on probation, and reduced the fine imposed on petitioner Raffe.

The evidence of the Government, with particular reference to the present petitioners, may be summarized as follows:

In 1929 and 1930 petitioner Raffe operated a securities brokerage business in Boston under the name of Mandel Raffe & Company (R. 6176). He sponsored the sale of various types of stock (R. 6181, 6187, 6206, 6217–6219, 6229), including stock in an investment trust known as Surety Investments Inc. (R. 131, 6176–6177, 6229, 9340), a royalty investment company known as Producers Royalty Corporation (R. 6176, 9340–9341), and Midcontinent Diversified Syndicate (R. 6178, 9341). A number of defendants named in the indictment were salesmen who worked for Raffe & Company (R. 6219–6221, 6226–6228). An enterprise known as National Publishers Service, which had originally been started by defendant Levine with Raffe's aid as a method of soliciting newspaper space (R. 6172), was, in 1933, utilized as an investment counsel service, in order to obtain names of prospective investors (R. 6129–6130). In the latter part of 1931 Raffe sent Fogelson, who had been working for him as a salesman (R. 9340), to Texas to buy wild cat land as cheaply as possible. Raffe intended to use

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such land in replacing royalties previously sold by him which had decreased in value (R. 9348–9351, 9368–9370). Fogelson bought land in Brewster County, Texas, in his own name (R. 9370–9373, 9376) and Raffe either sent or reimbursed him for the money expended in the purchase of the land (R. 9383, 9386). A large block of the land so purchased was transferred at Raffe's request to the Great Texas Oil Co., a registered trade name of Raffe (R. 9397–9398, 6206). In the latter part of 1933 the Texas Oil Company was transferred to Fogelson's name (R. 6232, 9479–9480, 9484). Raffe turned the land over to Fogelson with the understanding that he was to receive $5 an acre plus 50 percent of the profits received from the sale of the land (R. 9481) and Raffe sent to Fogelson various persons to whom the land was to be sold (R. 9492–9494, 9500–9511). Among the persons to whom the land was thus sold by Fogelson were defendant Joel Pike (R. 9495–9499) and defendant Mussman (R. 9505–9506, 9514–9515).

In 1934, at the instigation of Raffe, Pike and Ames started a royalty business under the name of Income Royalties (R. 4902–4911). In June of that year one Gaines was introduced to Pike by Raffe as an influential person with money who was interested in the business (R. 4911–4913). Gaines and Raffe agreed to transfer stocks and money to Pike's name in order to

enable him to obtain a broker's license (R. 4914–4915, 4963–4964). Pike obtained the license under the name of Joel Pike & Company (R. 4917) and rented an office in the same building where Raffe maintained his office (R. 4914). The arrangement was that Pike was to receive a salary and that profits were to be divided between Raffe, Gaines and Pike (R. 4916). Salesmen who had been registered as salesmen for Raffe & Company were reregistered under the name of Joel Pike & Company (R. 4919, 6231, 6233) and, at Raffe's suggestion, that company obtained larger quarters in order to have a room in which the salesmen could meet (R. 4924–4925). When salesmen requested Texas land from Pike, Raffe arranged to have Brewster County land transferred to Joel Pike & Company (R. 4925–4926, 4999, 5006). Raffe gave Pike letters received by the National Publishers Service and told him that the persons who sent the letters represented good leads (R. 4957, 4961). Pike gave these leads to various salesmen in the office (R. 4961). Late in 1935 Pike lost his broker's license (R. 4996) and he then worked as salesman trying to sell land and other securities, in part to persons whose names were given to him by Raffe (R. 5041–5042).

From about September 1933 one Samuel Mussman worked as a salesman for Raffe (R. 136). Mussman sold to various customers whose names

he obtained from Raffe (R. 169, 304, 320, 361, 377, 530, 543, 564, 571, 606, 625, 647–648) securities sponsored by Raffe (R. 128–130, 139–140, 378–379, 532) and western lands which he bought from Raffe, Joel Pike & Company and Fogelson (R. 169, 346, 364, 372–374, 548, 567, 572). In addition to paying for the land, Mussman and the salesmen with whom he worked divided with Raffe the profits received from these transactions (R. 169, 176, 308, 310–312, 340–341, 364, 537, 572, 620). Raffe and Mussman together devised methods of appealing to customers in order to effectuate sales (R. 187–188). Mussman had an office for the transaction of business the rent of which was paid by Raffe (R. 307, 315–316, 511).

In 1932 Fogelson for a time worked for Percy Winter & Co. in New York, where he met petitioners Cohen and Wachtel (R. 9401–9404). In the latter part of 1934, after Fogelson had returned to Boston (R. 9403–9408), he had a conversation with petitioners Cohen and Wachtel in New York (R. 9571–9572). Cohen and Wachtel were then operating a royalty trust known as Underwriters Group (R. 9608). Wachtel gave Fogelson a list of names of New England residents (R. 9582, 10380–10382), who had previously been visited by other salesmen of the Underwriters Group (R. 9588, 9590–9592). Fogelson and the Underwriters Group had considerable correspondence relating to the various names thus

furnished to Fogelson (R. 9598–9606). In the latter part of 1935 Fogelson turned over to Mussman some of the names which he had originally received from Wachtel (R. 9671, 9673). One such name was that of Dr. Post from whom Mussman succeeded in obtaining in exchange for land a royalty which he resold to Fogelson (R. 824, 9679). The transactions with Post form the basis of count 25. Proceeds received were divided among Fogelson, Wachtel, Mussman and Goldie (R. 337, 829–833, 1874, 2132, 3216).

Wachtel, through Gaines, was also supplying names to Joel Pike & Co. in Boston (R. 4971). On a visit to Boston he was introduced to Pike who gave him a check in payment of names previously supplied (Gov. Ex. 840, R. 4971).

Late in 1934 Gaines introduced Mussman to Wachtel (R. 380–381) and subsequently Wachtel told Mussman that he would like to have him meet his partner Joseph Cohen (R. 383). Early in 1935 Wachtel did introduce Mussman to Cohen at the office of the Underwriters Group (R. 384–385). Thereafter Wachtel gave Mussman a number of names, some of which resulted in the transactions involving the sale of Texas "oil" land by Mussman which formed the bases of certain of the count letters, e. g., count 1 discussed *infra*, pp. 16–17; Cleveland, count 5 (R. 886–887); Fennikoh, count 7 (R. 1049, 1932); Murray, count 18 (R. 925–928); Pettit, count 20 (R. 1103, 3286). In

the course of these transactions lulling letters devised by Wachtel, Cohen and Mussman were sent to customers on stationery bearing such names as Midwest Co. and Midcontinent Associates (R. 991).

In 1933 or 1934 the defendant Marion met Wachtel in New York (R. 7154). Wachtel told Marion that there was a new "racket" selling oil royalties and that he would arrange to have Marion connected with an office and would supply him with names to "qualify," i. e., prepare for sales (R. 7154–7156). Subsequently Marion was told not to go to the office because it was being investigated by the Attorney General of New York (R. 7158). Marion then got in touch with Wachtel, who introduced him to Cohen. Wachtel told Marion that he and Cohen were organizing an oil royalty trust which could be used as a front not only to sell securities but for the purpose of obtaining names (R. 7159, 7172–7174). Wachtel gave Marion the name of Martha Whitaker (R. 7175). Marion called on Miss Whitaker but did not succeed in selling her anything (R. 7176). He turned over the name to Mussman and drove Mussman to Miss Whitaker's house in Elizabeth, New Jersey (R. 7176, 656–657). Mussman obtained a royalty from Miss Whitaker (R. 660) and, at Wachtel's request, sold it to one Carl Phillips (R. 657, 661). The land sold to Miss Whitaker in exchange for the royalty was obtained from Joel Pike & Co. (R. 664–666).

Marion told Wachtel that he wanted "spots," that is, special names, and Wachtel replied that he would have to consult Cohen on the division of profits (R. 7187). Wachtel, Cohen and Marion had a conference in which a division of profits was arranged (R. 7189). Wachtel and Cohen then gave Marion the name of Mrs. McChesney (R. 7190) and told him that she had a very good royalty which they would like to get back into the office (R. 7192). Marion asked Rogoff to work with him on this deal (R. 7196). Rogoff visited Mrs. McChesney in December 1935 and reported to Marion that she was a "cinch" if prepared (R. 7198). Marion then called upon Mrs. McChesney and represented himself as a geologist (R. 7198). Rogoff succeeded in getting Mrs. McChesney to exchange her land for a block of land in Webb County, Texas (R. 7200). Rogoff gave the royalty to Marion to dispose of in accordance with the original understanding and Marion brought it to the office of the Underwriters Group (R. 7201). Marion's return of approximately $1,000 was divided between him and Rogoff (R. 7206, 7208). Marion also received the name of Dr. Washington from Wachtel and Rogoff sold Dr. Washington land in Webb County. Marion gave Wachtel $100 for the use of the name (R. 7209). Marion received from Wachtel the names of other persons (R. 7210, 7213) to whom Rogoff sold Texas land (R. 7211–7212, 7214), deeds to which had to be mailed for recording (R. 7221, 7804–7805). Profits on these transactions were divided between Rogoff

and Marion (R. 7213, 7215, 7217–7218) and Marion paid Wachtel for the use of the name (R. 7213, 7215). Although Rogoff did not know the source of the McChesney name (R. 7196, 7451), he did later know that Wachtel was supplying names to Marion (R. 7229, 7513, 7518).

One of the names given to Mussman by Raffe was that of James J. McDonald (R. 290). Mussman called on Mr. McDonald and his aunt, Ellen McDonald, and succeeded in selling to Miss McDonald potential oil lands, royalties and so-called rights (R. 291–303). In 1936 the defendant Richard Coshnear introduced Mussman to Joel Rosenberg (R. 997–998, 1344). Rosenberg told Mussman that he was selling Mexican oil leases and that he would like to have Mussman work with him (R. 997a, 1346). One of the names which he mentioned was that of the McDonalds (R. 999). Mussman, Goldie and Rosenberg agreed that they ought to work together in further deals with the McDonalds (R. 1352, 1373, 8209). Rosenberg represented himself as a Mr. Price from New Mexico, Goldie as an oil magnate, and Mussman as an investment counselor (R. 1372–1373; see R. 4440, 4465, 8206). Coshnear also visited the McDonalds as a Mr. Johnson of the Phillips Petroleum Company to tell them that Mr. Mason (Mussman) who was supposed to be ill would recover soon (R. 4471–4472; see R. 1365). Profits on these later transactions with the McDonalds were divided among Rosenberg, Cosh-

near, Goldie and Mussman (R. 1377, 3580, 8210–8211).

Rosenberg and Mussman also took a trip to Chicago in order to try to make sales to Mrs. Wyatt, to whom Rosenberg had previously sold oil leases (R. 1001; see R. 5602). Mussman and Rosenberg together obtained about $6,000 from Mrs. Wyatt, and after paying about $100 for the leases divided the profits between themselves (R. 1001–1005; see R. 5608–5609). Mussman also sold Mrs. Wyatt some Brewster County land, deeds to which were mailed from New York City (R. 1005, 1023, 1024, 5610, 5618, 5640–5641).

Rosenberg also discussed with Mussman the name of Dr. Wright (R. 1466–1467). Mussman told Dr. Wright that he was not receiving any returns on his original investment because he had failed to take up his potential rights (R. 1471). The money received from Dr. Wright was divided between Rosenberg and Mussman (R. 1474, 1477, 1481, 1492). When Wachtel heard about this activity he claimed that the name belonged to the Underwriters Group (R. 1494–1495) and it was agreed that Wachtel, Rosenberg and Mussman would divide profits (R. 1497). Subsequently, Mussman divided profits with Wachtel without making provision for Rosenberg (R. 1500) but, when Rosenberg complained, the others agreed to give him a percentage (R. 1527, 1533, 1614).

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The means by which victims were defrauded are illustrated by the particular transactions which form the basis of the count letters. For the sake of brevity we discuss only the transactions covered by count 1 on which petitioners Cohen and Wachtel received prison sentences, and count 2 on which petitioner Raffe received a prison sentence.[2]

Anderson transaction (*Count 1*).—Early in 1935 Wachtel gave Mussman the name of Amanda K. Anderson, which Wachtel had obtained from Fogelson (R. 402–405). Wachtel told Mussman that Cohen wished to obtain for the Underwriters Group certain royalties owned by Miss Anderson. Wachtel advised Mussman to make false representations to Miss Anderson about "rights, capping and overflow" (R. 481–485). Mussman and Goldie called on Miss Anderson and gave her the sales talk as prepared, telling her that if she made the exchange they advised she would eventually have royalties bringing greater returns than those she then owned (R. 488–489). Mussman and Goldie obtained from Miss Anderson two royalties and $900 in cash in return for "potential oil land" represented as owned by Midcontinent Associates (R. 490–491). Cohen wanted both royalties but Wachtel said that he had already promised one of them to Fogelson,

[2] Rogoff was convicted only on the conspiracy count and Rosenberg's conviction was sustained only as to the conspiracy count.

with the result that one royalty was turned over to Cohen and one to Fogelson (R. 490–491, 3126, 10,836). Some of the land transferred to Miss Anderson was obtained from Fogelson (R. 492). The proceeds of the deal were shared among Wachtel, Cohen, Fogelson, Goldie and Mussman (R. 491, 3126, 10774). Thereafter Goldie and Mussman made other sales to Miss Anderson but she received no income (R. 490, 492). She frequently phoned "Midcontinent Associates," a fictitious company which occupied desk space in a New York office but which had no assets (R. 637). To pacify her, Mussman, Goldie, and Wachtel mailed her several letters purporting to come from "Midcontinent Associates" (R. 474, Gov. Ex. 52, R. 476). One of these letters (Gov. Ex. 52, R. 476) was prepared or approved by Wachtel and mailed from New York City (R. 476, 1785–1787). The mailing of this letter forms the basis of Count 1.

Bacon transaction (Count 2).—Among the various names given to Mussman by Raffe was that of Miss Bacon (R. 606). Mussman and defendant Louis Brown called upon Miss Bacon (R. 607) and told her that she was not getting income from royalties previously purchased because she had not taken up her rights and was not receiving the benefits of the capping and overflow (R. 607–608). Mussman visited Miss Bacon several times and obtained various sums of money

from her, some of which he divided with Raffe (R. 608–612, 614–615). In the latter part of February 1935, Raffe, Brown and Mussman visited Springfield, Massachusetts, where Miss Bacon lived. Mussman called on Miss Bacon telling her that she still owed a balance of $305. While Mussman was there Brown called Miss Bacon from the hotel and stated that unless she paid up the balance then due she would get no "overflow" (R. 618–620). When Mussman returned to the hotel Raffe and Brown told him that they had called Miss Bacon in order to find out if he was reporting the amount of his sales correctly, and also because they thought that by that means they could induce her to pay more money. The money received as a result of Mussman's visit was divided between Mussman, Raffe and Brown, but no deed covering the purchase was delivered to Miss Bacon (R. 620–621).

Raffe failed to make the deliveries of land which had been sold to Miss Bacon and, in order to avoid trouble, Mussman and Goldie obtained some Texas land and delivered it to Miss Bacon (R. 622–623). Raffe heard about this situation and spoke to Mussman about it (R. 627–628). In 1936 Miss Bacon continued to make complaints that she had received no income. Raffe, Goldie and Mussman met in Boston to decide what to do about the matter. Raffe stated that there was nothing to worry about because there was so little

money involved and because the matter was almost outlawed by the statute of limitations (R. 632). However, in order to satisfy Miss Bacon, Goldie and Mussman sent her a letter dated February 25, 1936, on the stationery of Midcontinent Associates. Goldie signed the letter in the name of L. J. Cronin and the letter was mailed from Manhattan (R. 633, Gov. Ex. 84, R. 8136). A few weeks later, in the spring of 1936, Goldie and Mussman met Raffe and told him about the letter that they had sent to Miss Bacon (R. 637). Goldie also reported that he had visited Miss Bacon and pacified her (R. 639–641).

ARGUMENT

1. All of the petitioners contend that there was a fatal variance between the indictment which charged one scheme and the proof which, they assert, established many separate schemes, with the result that petitioners were subjected to a lengthy trial in which their rights were materially prejudiced.[3] Petitioners place particular emphasis on that part of the opinion of the circuit court of appeals which states that, even if there were a variance, it would not be fatal (pp. 2252–2253)[4] and ignore the earlier part of the opinion in which

[3] Rosenberg, Pet. 11–19; Wachtel, Pet. 13–19; Cohen, Pet. 14, 27–36; Raffe, Pet. 6–7, 16–23, 26–34; Rogoff, Pet. 13–15.

[4] The page references to the opinion below are to the numbers as given in the reprint of the opinion as appendices to the petitions of Cohen and Raffe.

the circuit court of appeals found that "even in the strictest sense there was no variance; a single 'scheme' was alleged and a single 'scheme' was proved, though by hypothesis it did not include by any means all the transactions proved" (pp. 2250–2251). The scheme, the conspiracy, here proved was, it is true, a loose confederation rather than a closely integrated union. The evidence shows that there were, in general, two groups, one in Boston centering on Raffe and Fogelson, and another in New York centering on Cohen and Wachtel; and that, even within these groups, there were varieties of fraud. Thus, petitioner Rogoff was apparently engaged in selling oil lands on his own but used names supplied by Wachtel for which Wachtel was paid, and obtained in exchange for his own land oil royalties desired by Cohen and Fogelson which were resold to them. Petitioner Rosenberg also operated a scheme of his own but worked with others more directly tied to the conspiracy whenever it proved to his advantage (see Statement, *supra*, pp. 14–15).[5] There was, however, as the court below found, ample evidence that "the two groups worked with a general understanding and with mutual help" (p. 2250). The supplying of names by the New York group to the Boston group and occasionally by the Boston group to the New York one, the

[5] Rogoff and Rosenberg are adjudged guilty only of the conspiracy count (*supra*, pp. 6–7, 16).

supplying of land by the Boston group to the New York group, the interchange of personnel, the division of profits by various members of both groups (see Statement, *supra*, pp. 10–11, 12, 13, 16), all demonstrate that there was in fact a mutual agreement to work together in furtherance of the common end of fleecing the public. Under such circumstances it was entirely proper to charge all the petitioners as members of one conspiracy even though they were not all aware of the full scope of the conspiracy and did not all participate in it to the same degree. *United States* v. *Valenti*, 134 F. (2d) 362 (C. C. A. 2), certiorari denied, 319 U. S. 761; *United States* v. *New York Great A. and P. Tea Co.*, 137 F. (2d) 459, 463 (C. C. A. 5), certiorari denied, 320 U. S. 783; *Oliver* v. *United States*, 121 F. (2d) 245 (C. C. A. 10), certiorari denied, 314 U. S. 666; *Lefco* v. *United States*, 74 F. (2d) 66 (C. C. A. 3); *Wyatt* v. *United States*, 23 F. (2d) 791 (C. C. A. 3), certiorari denied, 277 U. S. 588; *Martin* v. *United States*, 100 F. (2d) 490, 495–496 (C. C. A. 10), certiorari denied, 306 U. S. 649.[8] These cases all

[8] These cases dispose of petitioner Rogoff's contention (Pet. 10–13) that he was improperly convicted because the evidence shows that he did not know the source of the names supplied by Marion. Aside from the fact that Marion testified that, subsequent to the McChesney transaction, petitioner Rogoff did know that the names were coming from Wachtel, it is clear that, in the McChesney transaction (*supra*, pp. 13–14) Rogoff knew that Marion wished to obtain the royalty for an undisclosed source and Rogoff agreed to aid the consum-

involved conspiracies with fluctuating membership in which many of the conspirators did not know the full scope of the conspiracy and did not know many of their co-conspirators, but in which there was nevertheless found to be a common thread and a common purpose binding all the defendants together in one conspiracy.

This was not, as petitioners apparently contend, a situation in which offenses known to have been committed by different persons were joined in one indictment for reasons of expediency. Here the defendants, to some extent operating their own frauds, were at the same time conducting frauds which interlocked with larger units and these larger units in turn interlocked with each other. To have charged and tried each separate transaction as a separate offense, or even to have separated the New York and Boston groups, would have been to endow the conspiracy with a simplicity that it did not possess. The interlocking relationships between the various defendants was not of the Government's making and the situation was one in which it was impossible to determine at the outset, if at all, where the united effort ended and the separate individual frauds began. The jury were instructed that if they found that "the business activities of any one of

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mation of that plan. Hence, he knowingly furthered the object of the conspiracy although he may not have been aware of the particular identity of some of his co-conspirators.

the defendants were wholly outside the State of New York and that he was not in any [way] associated directly or indirectly with others in New York State with the mailing of letters or any other overt act in the State of New York," then such defendant was not properly within the jurisdiction of the court and could not be convicted (R. 15670–15671).[7] The trial judge also called the jury's attention to defendants' contention that a general scheme was not proved as well as to the various factors which, if believed, would show that there was such a conspiracy (R. 15681–15684). The existence of a single conspiracy was thus an issue directly before the jury, and its verdict showing that it found that there was such a general conspiracy is, as we have shown, supported by the evidence. Cf. *Lefco* v. *United States,* 74 F. (2d) 66 (C. C. A. 3).

The trial in this case was undoubtedly long and complicated but the short answer to petitioners' contention that the jury must have been confused is that the verdict rendered demonstrates that the jury was not confused. The jury convicted all of the defendants on the conspiracy charge, but on the substantive counts convicted only those de-

[7] The trial judge did in this instruction say New York State rather than, as would have been technically correct, the Southern District of New York, but since the really important issue was whether the Boston activities were sufficiently related to the New York conspiracy to be punishable in that district, the error could not have been significant.

fendants who were directly involved in the particular transaction forming the basis of the count. The extreme care exercised by the jury in this respect is shown by the fact that, although several government witnesses spoke of Cohen and Wachtel as partners who shared in the proceeds from the sales to various persons whose names were supplied by Wachtel (e. g., R. 383, 7184), the jury convicted Cohen only on those counts on which his active participation was more directly shown. Considering the nature of the conspiracy here tried, the verdict does not, as petitioner Raffe claims (Pet. 17–18), show that the jury found that there were a number of separate conspiracies rather than one general scheme. The verdict shows that the jury understood the nature of the conspiracy as a loose concert of action and chose not to hold each defendant liable on substantive counts for all acts committed by the entities which together formed the conspiracy. Even in the case of more closely integrated conspiracies, it is not unusual for a jury to convict different defendants on separate substantive counts[8] but such fact does not serve to divide a general scheme into separate unrelated schemes. Both petitioners Rosenberg (Pet. 12) and Raffe (Pet. 29) point to the fact that the circuit court

[8] E. g., *Blue* v. *United States*, 138 F. (2d) 351 (C. C. A. 6), certiorari denied, 322 U. S. 736; *United States* v. *Beck*, 118 F. (2d) 178 (C. C. A. 7), certiorari denied, 313 U. S. 587.

of appeals reversed the convictions of petitioner Rosenberg on the substantive counts as proof of their contention that the jury was confused. It is to be noted, however, that as to count 7 there was testimony that the petitioner Rosenberg drove with Mussman to the place where the victim lived (R. 1052) in addition to the fact that Mussman testified that petitioner Rosenberg shared in the profits (R. 1061);[9] as to count 19, the McDonald transaction, petitioner Rosenberg was definitely implicated in its later aspects, the only question being whether the letter which formed the basis of the count was mailed before or after he joined forces with Mussman and Goldie (see *supra*, p. 14).

Petitioners strongly attack the statement in the opinion below that the possibility of confusion must be balanced against the necessity of bringing all offenders to trial (p. 2257), but they disregard the immediately preceding statement of the court that "We do not indeed mean that this would excuse the absence of the fundamentals of a fair trial, but these were present." In this case the jury was called upon to determine the guilt of only 13 persons, and of those now seeking review, three (Cohen, Wachtel and Raffe) were, as the court below found, so definitely implicated

[9] The circuit court of appeals thought that this was probably a slip of the tongue on Mussman's part since Edward Rosenberg, a defendant not on trial, rather than Joel Rosenberg, was more closely connected with the defrauding of this victim.

as leaders that there was no danger that the guilt of others would be attributed to them. The other two stand convicted only upon the conspiracy count, and the evidence indisputably links them to the conspiracy. A trial for mail fraud has none of the emotional hazards of a treason trial and the remarks of the Seventh Circuit in *United States* v. *Haupt,* 136 F. (2d) 661, as to the danger of a joint trial for treason do not, as petitioners Cohen (Pet. 28–32) and Raffe (Pet. 30–31) claim, represent a conflict with the decision below in respect of a joint trial for mail fraud.[10]

2. Petitioners Cohen (Pet. 36–40), Raffe (Pet. 34–35), Rosenberg (Pet. 19–23), and Wachtel (Pet. 19–23) all urge as a reason for the granting of certiorari the admitted conflict between the instant decision of the Second Circuit and the decisions of other circuits as to the necessity of proving an overt act within the statute of limitations. We do not believe that the conflict warrants the granting of certiorari in this case, for the issue involved—whether it was error not to withdraw from the jury's consideration 5 overt acts occurring beyond the period of limitations—

[10] Rosenberg's contention that the reversal by the circuit court of appeals of his conviction upon the substantive counts establishes that the scheme had ended before he joined the conspiracy (Pet. 23–24), is without merit. The plan to defraud the McDonalds continued and he actively aided therein after the mailing of the count letter (see Statement *supra*, pp. 14–15).

may, as the opinion below indicates, be determined on other grounds. The circuit court of appeals found that it was "in the highest degree unlikely" that the jury based its verdict on the conspiracy count on any of the overt acts alleged to have occurred beyond the period of limitations, but felt impelled to discuss the question "against that purely theoretical chance" (p. 2263). We submit that the likelihood of any such "purely theoretical chance" is so remote as to be nonexistent. The first four overt acts charged were meetings between Mussman, Cohen and Wachtel before March 1935, whereas Mussman testified that he first met Cohen in April of 1935 (see R. 3029–3030). The jury convicted petitioners Raffe, Cohen and Wachtel on substantive counts all of which were based on letters written within the period of limitations, showing clearly that the jury found that they were part of the conspiracy during the period within the statute of limitations. Petitioners Rogoff and Rosenberg did not come into the conspiracy until after September 1935. The United States Attorney, in his summation to the jury, referred only to the overt acts which were supported by documentary evidence, all of which were within the period of limitations (R. 15263–15264).

Moreover, the trial court, although it failed to withdraw the overt acts beyond the statute from the jury's consideration, did instruct the jury fully

that, if a defendant withdrew from the conspiracy, he was no longer responsible for the acts of his co-conspirators and that, if he had withdrawn more than three years prior to September 30, 1938, the date of the indictment, he could not be convicted because of the bar of time (R. 15666–15667). In view of all these circumstances it is inconceivable that the jury could have based its verdict on the conspiracy count on the five overt acts which were beyond the period of limitations. Assuming that it was error not to withdraw the overt acts from the jury's consideration such error was, under the narrowest possible construction of the harmless error doctrine, non-prejudicial error.[11]

3. The other contentions made by petitioners individually present no questions of merit.

a. Petitioner Cohen contends (Pet. 42–43) that the court erred in stating that, in reviewing the evidence, it was not required to apply the test of reasonable doubt. Its statement to such effect is in accord with the decisions of this Court which have defined the function of appellate review as "only to ascertain whether there was some competent and substantial evidence before the jury fairly

[11] In stating that as to other errors alleged, and not discussed, "even were they errors, we should not because of them reverse convictions so just upon the merits" (p. 2265), the circuit court of appeals was not, as petitioner Cohen contends (Pet. 47–52) adopting an unduly broad construction of the harmless error doctrine, for it is evident that the court in its opinion discussed all questions of substance.

tending to sustain the verdict." *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 254; *Burton* v. *United States*, 202 U. S. 344, 373. In any event, the opinion, as a whole, makes abundantly clear that by any test of the sufficiency of the evidence, the circuit court of appeals was of the opinion that the convictions were "just upon the merits" (p. 2265).

b. Petitioner Raffe complains (Pet. 23–26) that his activities were outside the jurisdiction of the court and beyond the period of limitations. However, as we have shown (*supra*, pp. 22–23, 27–28), the judge fully and correctly instructed the jury on both these points and the evidence supports the finding that Raffe and his Boston associates were cooperating with the New York group in one general conspiracy. The counts on which Raffe was convicted involved the mailing of a letter from New York within the period of limitations and there was other evidence to show that he had not disassociated himself from the conspiracy more than three years before the return date of the indictment but that within such period he was cooperating with various defendants in completing frauds started earlier or in pacifying victims previously defrauded (e. g. R. 839–840, settlement with Miss Williston; Gov. Ex. 817A, R. 4804–4805, lulling letters to Mrs. Klimm).

c. Both petitioners Cohen (Pet. 60–62) and Raffe (Pet. 14–15) attack the sufficiency of the

evidence to establish the mailing within the jurisdiction of the district court of the letters on which counts 1 and 2 respectively are based. The circuit court of appeals stated in respect of this contention (p. 2254):

> We have examined the disputed passages [evidence] in all cases, and we are satisfied that this contention is without basis though it would indirectly extend this opinion to discuss each case in detail. We, of course, agree that in the case of all the first 29 counts the crime of Section 338 was the mailing of the letter and that this must therefore be in the district where the indictment is found; but no more persuasive evidence is required upon this than upon any other issue in the case.

The question is wholly one of the sufficiency of the evidence and does not present an issue for further review by this Court. *United States* v. *Johnston,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 589–890.

d. Petitioners Raffe (Pet. 32–34) and Cohen (Pet. 33–34, n. 14) also complain of the failure of the trial judge to curb the Government witness Mussman. Most of Mussman's conduct which forms the basis of these complaints consisted of answers given on cross-examination. It is difficult to see why petitioners should claim prejudice because of the fact that Mussman revealed a hostility toward his confederates which they them-

selves endeavored to bring before the jury. The trial judge in a conference between the attorneys stated that in his opinion each person had a particular "genius of his own" which revealed itself on the witness stand (R. 584–585). The judge was obviously patient, but he did make a number of attempts to curb Mussman's outbreaks (e. g. R. 1852, 1784, 3122, 3123, 3321, 3511–3512, 3848, 4169, 4179). The manner of dealing with the witness was clearly one within the trial judge's discretion as to the conduct of the trial, and a reading of the record of Mussman's testimony as a whole makes it clear that the trial judge did not abuse his discretion or deprive petitioners of a fair trial.

e. Petitioner Cohen contends (Pet. 53–54) that it was prejudicial error as to him to allow the prosecutor to read to the jury the opinion of the Circuit Court of Appeals for the Tenth Circuit in the case of *Rosenberg* v. *United States,* 120 F. (2d) 935. Rosenberg had testified on redirect examination that although he had been convicted in another mail fraud case, the indictment had been dismissed on appeal (R. 14689–14690). On re-cross-examination the prosecutor then read the opinion to show that the decision turned solely on the lack of proof of mailing (R. 14693–14694). There is nothing in the reported opinion, which merely gave the facts of the transaction there involved, which could have been prejudicial to

the other defendants and the judge instructed the jury to disregard any facts not directly relevant to the case at bar (R. 14694). The only effect which the opinion could have had was to emphasize a point favorable to the defendants, that the evidence must establish not only a scheme to defraud, but a mailing in execution of the scheme.

f. Petitioner Cohen also complains (Pet. 54–57) of the prosecutor's questions as to whether he knew that some of his associates had been convicted of crimes involving deceits (R. 13419, 13424–13425, 13427–13430). Cohen denied such knowledge, except as to two persons, and as to those he was allowed to explain the circumstances under which he employed them (R. 13420–13421, 13429). On redirect examination Cohen testified fully about the circumstances which led him to employ the various salesmen (R. 13656–13664). It was, as the court below held, "competent and relevant to prove that Cohen had employed as subordinates, or been associated with those whom he knew to have been convicted of crimes" (p. 2259). The judge allowed the prosecutor to specify the nature of the crime on the ground that, if the questions were asked without particularization, the crime might appear to be more heinous than it was (R. 13425–13426). That the prosecutor was justified in not resting on a blanket denial is shown by the fact that after making such denial (R. 13419) Cohen did admit to knowledge of two convictions (R. 13420, 13429).

g. Petitioner Cohen contends (Pet. 57–59) that he was denied his constitutional right to be present at all stages of the trial by reason of the fact that the trial judge privately examined statements previously made by Mussman to the United States Attorney and then held that "there are reasons of public policy for these remaining exhibits to be confidential" (R. 4479).

The United States Attorney had made available to defense attorneys all papers turned over by Mussman (R. 3735–3742) but stated that there was some material not relevant to the defendants on trial which had been withheld (R. 4175). The court requested the United States Attorney to submit the additional papers to him (R. 4175–4177) and the United States Attorney stated that he would explain in private his reasons for not showing them to the court (R. 4176). Subsequently the court made its ruling that there was no foundation laid for the request by the defendants (R. 4478), and that, in any event, its examination of the exhibits convinced it that there were reasons of public policy for keeping them confidential (R. 4479). Photostats of the exhibits were sealed and sent up to the circuit court of appeals, which stated "We too have examined them, and they had no impeaching value whatever" (R. 2260). It does not appear from the record whether there was a private conference between the judge and the United States Attorney, since the judge in his ruling referred only to his

examination of the exhibits. Even assuming that such conference took place, it does not, we submit, constitute a denial of petitioners' constitutional rights. It is questionable whether petitioners were entitled to as much consideration as they received in this regard. The court below in *United States* v. *Krulewitch*, 145 F. (2d) 76, went further than any prior federal case in holding that a defendant ought to be allowed to examine a statement previously given by a witness to investigating officials but even that decision is limited to a situation where it is definitely indicated by testimony at the trial that the statement would have an impeaching effect. No such situation exists here. Even in a case where it appears that the statement might have impeaching value, the question whether permission to disclose it would be consistent with public policy is plainly one peculiarly within the province of the trial judge (cf. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 233–234). Certainly in the determination of such a question the judge is entitled to obtain from the United States Attorney the relevant information to be considered. Manifestly, to disclose that information at the trial in the presence of others, including the defense attorneys, would be to defeat the relevant public purpose.

h. Petitioner Rosenberg (Pet. 24–26) objects to the court's denial of his motion to inspect the minutes of the grand jury in respect of the testi-

mony of Ellen McDonald, a victim who had died before the trial. The granting of a motion for inspection of the grand jury minutes is a matter within the discretion of the court. Cf. *United States* v. *Socony-Vacuum Oil Company,* 310 U. S. 150, 233–234. Here Ellen McDonald's testimony could not have been offered in evidence either by the Government or by Rosenberg. Rosenberg could and did testify himself as to his transactions with her. Manifestly, therefore, there was no abuse of discretion in denying the motion.

CONCLUSION

For the foregoing reasons we respectfully submit that the petitions for writs of certiorari should be denied.

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